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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1088

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

HENRY A. KISSINGER,

Petitioner,

v.

MILITARY AUDIT PROJECT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Henry A. Kissinger respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The *per curiam* judgment of the Court of Appeals and an accompanying memorandum, which will not be reported, is reproduced in the Appendix. The opinion of the District Court, which is reported at 442 F.Supp. 383, and its unreported orders of January 25, 1978, and March 2, 1978, are also reproduced in the Appendix (hereafter "App.").

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Freedom of Information Act authorize district courts to order persons who are not agencies to transfer to an agency documents which are not, and never were, in the custody or control of the agency and which the agency does not, and never did, claim as its records?

2. If the Freedom of Information Act does authorize this type of suit, what standards should apply in determining whether such documents are "agency records" within the meaning of the Act?

3. If the documents reflect both personal conversations and conversations that pertain to government business, is it constitutionally permissible to authorize government officials to possess, read and retain all of them?

STATUTES AND REGULATIONS

The relevant portions of the Freedom of Information Act, 5 U.S.C. §552, the Privacy Act, 5 U.S.C. §552a, the Federal Records Act and related laws, 44 U.S.C. Chapters 21, 29, 31 and 33, the Federal Property Management Regulations, 41 C.F.R. Part 101-11, and the Foreign Affairs Manual of the Department of State, 5 FAM Part 400, are reproduced in the Appendix.

STATEMENT OF THE CASE

A. Introduction

At issue in this case are certain rough notes made of Dr. Kissinger's telephone conversations when he was Secretary of State, which he donated upon leaving office to the United States and deposited with the Library of Congress. After the notes had been transferred to the Library, respondents filed Freedom of Information Act ("FOIA") requests with the Department of State seeking access to them. The Department denied their requests, and respondents sued it under FOIA to contest the denial. In this suit respondents also joined Dr. Kissinger and the Librarian of Congress and asked for an order directing them to transfer the notes to the State Department. The decision below grants this relief.[1]

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[1] Plaintiffs below were two groups of FOIA claimants: (a) the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenburg, Arthur Link, and William Safire (the "RCFP respondents"); and (b) the Military Audit Project and Felice D. Cohen (the "MAP respondents"). The defendants below, in addition to Dr. Kissinger, were the Department of State and its Secretary, Cyrus R. Vance, the Librarian of Congress, Daniel J. Boorstin, and the Archivist of the United States, James B. Rhoads.

FOIA requires the production of "agency records," but does not define the term. In this case, the State Department concluded — both before and after the donation — that under its rules the notes were not "records." The courts below ignored the Department's application and interpretation of its rules, and found instead that the notes are records because the Department had a common law right to own and possess them. In so doing, they assumed, without discussion, that FOIA permits private citizens to challenge agency recordkeeping decisions, that courts may review such decisions *de novo*, and that in such cases agency rules and practices need be given no weight.

Dr. Kissinger believed when the notes were made that they would not be treated as official records. That belief was based on the Department's established practice and regulations, as confirmed by a written opinion of its Legal Adviser. The decision below retroactively reclassifies the notes as records. It is undisputed that the notes contain purely private conversations and other unofficial matters intermingled with discussions of government business. Yet the order below requires that all of the notes must be transferred to permanent State Department custody and that all of them must be read by its personnel to determine which are subject to FOIA disclosure.

No court has ever before held that FOIA applies to documents not in the custody or control of an agency, or to persons who are not "agencies." No court has ever before held that FOIA authorizes *de novo* review of agency recordkeeping determinations. No court has ever before sanctioned government seizure of private papers to serve the interests of FOIA claimants.

We believe the decision below is wrong both in law and in principle. We ask this Court to grant certiorari so that the important issues of federal law which it presents may be reviewed.

B. Facts

The legal issues are novel and substantial. The facts, by contrast, are neither complicated nor disputed.[2]

The Telephone Notes

The documents at issue in this case came into being as the result of a common practice known as monitoring, in which a third party listens to and takes notes of a government official's telephone conversations. This procedure has been used for decades by senior officials to assist in the internal management of their offices. The notes serve as a rough log or daily diary to which the official and his immediate staff can refer in carrying out the ongoing work of the office. This work includes the production of correspondence, memoranda and other formal documents which are filed as official records of the agency. The notes are not filed, because they have traditionally been regarded as preliminary working papers that have no official significance after the records are created.[3]

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[2]Most of the facts appear in an uncontroverted affidavit which Dr Kissinger filed in the District Court. App. 73a. Other references are to the Joint Appendix ("JA") filed in the Court of Appeals.

[3]Notes, drafts, preliminary worksheets and similar papers fall within a general class of informal documents known as "non-record materials." Such materials need not and, indeed, should not be filed as records. *See* 41 C.F.R. §101-11.401-3(d) and pp. 18-20, *infra*. A recent study prepared for the National Study Commission on Records and Documents of Federal Officials (hereafter "National Study Commission") states that

> [f]ederal officials in all branches of government accumulate information in the form of memoranda of conversations, transcripts, speeches, taped conversations, diaries, and correspondence reflecting the private opinions and advice of colleagues and others. Such records are not "personal" in that they do not deal with strictly private affairs and they are not "official" in the sense that they do not directly document the transactions and policies of federal

The same procedures were followed in Dr. Kissinger's case. During his years in government, a secretary generally listened to and took notes of Dr. Kissinger's telephone conversations. The notes were then used by his Executive Secretary to make up his appointments calendar. His Senior Special Assistant also read them to keep abreast of his activities in order to know whether any matters discussed by telephone required follow-up or implementation. The function of the notes was to ease the administrative burdens of the office; they had no other purpose. App. 73a-74a. The notes were not official records of Dr. Kissinger's oral commitments and decisions; the official records were the formal documents that were produced, circulated and filed in the ordinary course of business as part of the follow-up process.[4]

The notes were never circulated outside Dr. Kissinger's office, never intermingled with the State Department's official records, and never seen by anyone other than Dr. Kissinger's immediate aides. Throughout his years at the State Department, the notes were kept in Dr. Kissinger's office with his personal papers in files marked "personal." App. 74a-75a. This treatment was consistent with his understanding that the notes were "workaids which I could

organizations. Such material has usually been treated as personal correspondence.

National Study Commission, Memorandum of Findings on Existing Custom or Law, Fact and Opinion 59 (1977).

[4]The official records of Dr. Kissinger's oral transactions are voluminous. One of the FOIA requests filed in this case asked for all "memoranda, aide memoirs, memoranda of conversation . . . or other written" records of conversations "conducted by Mr. Kissinger in his capacity as Secretary of State. . . ." JA 84. The Department denied this request as overly broad, stating it "apparently includes aide memoires, diplomatic notes, memoranda of meetings, memoranda of telephone conversations and correspondence between the former Secretary and persons both within and without the Department of State — a very large and undifferentiated volume of material." JA 90.

retain or discard as I chose as had several of my predecessors and many other officia. App. 74a.

Because the notes were not designed to serve as official records, no effort was made to restrict monitoring to purely business calls. The notes therefore reflect not only official but also many non-official and private conversations.[5] App. 74a. Nor were the notes edited for accuracy and completeness or to remove personal and other irrelevant matters. There was no need for this. Those who had access to them — Dr. Kissinger and his closest aides — already knew the substance of the conversations and could obtain the limited information they needed from the unedited materials. App. 75a.

Had Dr. Kissinger known the notes might be viewed as official records, he would have been obliged to put them in proper form for filing.[6] Since he had no duty to create a

[5]Respondents argued below, and the District Court found, that the notes necessarily related to official matters because State Department policy prohibited monitoring except when "absolutely essential to the conduct of business." App. 56a. This conclusion is based on a misreading of a letter from the Department's Acting Assistant Secretary for Congressional Relations to former Congresswoman Bella Abzug. In fact, the letter states that the general prohibition is subject to an exception which permits "a third party to listen to the telephone conversations of the senior principal officers of the Department for the purpose of taking notes or making appointments and to improve the general efficiency of operations." App. 85a-86a.

[6]Dr. Kissinger's affidavit makes clear that, while some of the notes are substantially verbatim,

> many others are only rough approximations of what was said [containing] misspelled names, omissions, garbled passages, and outright errors of transcription. Although the notes are useful in refreshing my recollections of particular conversations in which I participated, I do not believe they could be regarded as accurate records of my conversations unless they were first corrected and placed in proper form for filing as records. App. 78a.

record of every telephonic statement uttered during his tenure as Secretary of State, he would probably have chosen to discontinue the note-taking altogether rather than undertake this arduous and time-consuming task. App. 75a.

The Donation

Near the end of his term, Dr. Kissinger decided to donate papers relating to his career in government and earlier years to the United States. He chose the Library of Congress as depository because it already had an extensive collection of papers donated by previous Secretaries of State. App. 75a.

The donation included personal materials collected during his years at Harvard, copies of official documents on which he had worked, and the contents of personal files he had accumulated while in government. App. 75a. To donate the papers relating to his activities as Secretary of State, it was necessary for him to comply with State Department security regulations and other rules applicable to removal of papers by retiring officials. This he did. App. 75a-76a, 80a-83a.

As part of this process, Dr. Kissinger sought and received a written opinion of the Department's Legal Adviser concerning the status of the telephone notes. This opinion confirmed previous oral advice that the notes were not State Department records.[7] However, to assure completeness of the Department's records, the Legal Adviser recommended that the notes be reviewed and extracts made of any discussion of a significant government activity or decision not otherwise reflected in the official files. App. 67a. This, too, was done; the extracts were then delivered to the

[7]The oral advice was first given in January 1976, when the State Department rejected a FOIA request for a portion of the notes on the ground that they were not records subject to the Act. This advice was repeated on a number of occasions thereafter, JA 271-72, and reduced to writing on November 11, 1976. App. 65a, 76a.

Department and are presently filed there with the other records of Dr. Kissinger's service as Secretary. App. 77a.

The donation was made in November and December 1976, pursuant to deed of gift agreements signed by Dr. Kissinger and the Librarian of Congress. The donation agreements restrict access to most of the collections for a term of years. Since the telephone notes affect Dr. Kissinger's privacy and the privacy of those with whom he spoke, the agreements restrict access to these materials during the lives of both parties to the conversations.[8] App. 77a-78a.

C. Proceedings Below

After the donation was completed and publicly announced, two sets of claimants filed FOIA requests with the State Department seeking access to them.[9] The State Department denied the requests on two grounds: *first*, that the notes were not "agency records" subject to FOIA, and *second*, that the documents were not in any event within its custody or control. Following denial of their requests, respondents brought separate suits — later consolidated — not only against the State Department but also against the Librarian of Congress and Dr. Kissinger.

On cross-motions for summary judgment filed by respondents and by Dr. Kissinger, the District Court held that the notes made of Dr. Kissinger's conversations when he was Secretary of State were State Department agency records

[8]Such restrictions are common. *See, e.g.*, J. Broderick, Personal Papers of Federal Officials 15-17 (Library of Congress 1976); National Study Commission, Study of the Records of Supreme Court Justices 46-50 (1977).

[9]The RCFP respondents requested access to all the notes, including those made when Dr. Kissinger was a Presidential Assistant. The MAP respondents limited their request to notes made when Dr. Kissinger was Secretary of State.

which must be returned to its custody.[10] App. 58a. Since the notes had never previously been part of the Department's record system, the District Court's order directed the Department to take possession of them, to read them to determine which portions are subject to FOIA disclosure and, thereafter, to release all non-exempt portions to respondents.[11] App. 60a-61a.

On appeal, the Court of Appeals affirmed in a *per curiam* order entered seven days after oral argument. In a memorandum, which under Local Rule 8(f) is not published, the court stated it was "in full agreement on all issues with the opinion of the District Court . . . and its orders issued pursuant thereto . . . ."[12] App. 49a.

[10]The District Court denied the portion of the RCFP motion which related to notes made when Dr. Kissinger was a Presidential Assistant. App. 59a-60a. The decision on this point was affirmed on appeal, App. 49a-50a, and is not here at issue.

[11]The government defendants did not move for summary judgment; they advised the District Court that none of their rights were foreclosed by a decision in the case and they had no objection to decision of the case on the basis of Dr. Kissinger's motion. Transcript of Oral Argument 26 (September 28, 1977). They also did not appeal, but instead submitted an *amicus curiae* brief supportive of Dr. Kissinger's position.

[12]This Court stayed the District Court's order pending the Court of Appeals' decision. The Court of Appeals has stayed issuance of its mandate pending the filing of Dr. Kissinger's petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

Summary: This Case Presents Novel And Substantial Issues Concerning The Scope Of The Freedom Of Information Act, The Relationship Between That Act And The Federal Records Act, And The Constitutional Privacy Rights Of Past And Present Federal Officials.

The courts below held, on the authority of *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), that FOIA authorizes declaratory and injunctive relief against persons who are not "agencies." This unprecedented conclusion is bottomed on the assumption that FOIA applies to any document originated by a government employee, whether or not the agency has it within its custody or control. That assumption conflicts with the language of the Act. FOIA authorizes courts to order agencies to cease withholding records they are obliged to produce. It does not authorize courts to order agencies to create documents, or to direct agencies to procure documents they do not have. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Nothing in *Bannercraft* suggests that a court may require third parties to deliver documents to an agency in order to cure what otherwise would be a lack of subject matter jurisdiction.

The relief granted below was predicated on the conclusion that the notes were State Department "agency records." That conclusion was based not on a finding that the State Department's records management rules were invalid or improperly applied, but on the theory that the Department had a common law property right in all documentary materials produced by Dr. Kissinger within the scope of his employment. The assumption that FOIA grants courts *de novo* authority to decide whether documents sought under the Act are "agency records," and

to disregard agency rules and practices in making such decisions, opens a new and very broad avenue for citizen suits to second-guess agency recordkeeping determinations. We believe Congress intended no such result.[13]

The decision below also raises more fundamental questions. Dr. Kissinger legitimately believed when the notes were made that they would not be treated as official State Department records. The decision below retroactively reclassifies the notes as records in a manner which invades Dr. Kissinger's constitutional privacy rights and threatens the privacy rights of many other past and present government employees. The order below goes further. Although the District Court found the notes were "personal in some respects," App.58a, it nonetheless directed the State Department to take possession of and to read them all.

[13]In the memorandum accompanying its judgment, the Court of Appeals says that, because the Government did not appeal, "a judgment affirming the District Court on the ownership issue may make consideration of most of the other issues Mr. Kissinger raises unnecessary." App. 49a. If this cryptic remark was intended to imply that the Government is the only proper party to argue the above issues, it is surely wrong.

It is not possible to affirm the District Court without accepting its assumption that FOIA provides *de novo* review of agency record-keeping determinations, nor is it possible to render any judgment against Dr. Kissinger without first establishing *respondents' right* to assert that the notes belong to the State Department. *Cf.* 44 U.S.C. §3106; *see* note 16, *infra*.

It is clear that a party affected by a judgment may, on appeal, urge any grounds sufficient to secure reversal, even though reversal also benefits non-appealing parties. *In re Barnett*, 124 F.2d 1005, 1008-1011 (2d Cir. 1942); *see also Continental Casualty Company v. United States*, 167 F.2d 107 (9th Cir. 1948), *cert. denied*, 337 U.S. 940 (1949). The decision below was based on FOIA, but FOIA provides no foundation for judgment against any of the defendants. Dr. Kissinger is fully entitled to urge this defect as grounds for reversal, whether or not the Government defendants appeal. The Government agrees. *See* Brief of the United States as *Amicus Curiae*, filed in the Court of Appeals, at 22-23.

None — regardless of content — is to be returned. Respondents argued below that *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), provides support for this extraordinary procedure. If *Nixon* was, indeed, the inspiration for the order, we believe the courts below seriously misapplied it. And if *Nixon* does not support the order, there is no decision of this or any other court which could possibly justify it.

A. The Decision Below Misapplies *Bannercraft* And Impermissibly Extends The Scope of FOIA To Documents Not In The Custody Or Control Of An Agency And To Persons Who Are Not Agencies.

We begin with a self-evident proposition: FOIA does not apply to Dr. Kissinger, a private citizen, or to the Library of Congress, which is not an "agency." *See* 5 U.S.C. §552(e). Yet the relief granted was an injunction directing these parties to transfer the notes to the State Department. The threshold question is whether FOIA authorizes remedial orders of this sort. The courts below held that it does, on the rationale that the objective of the injunction was to assist in enforcing the Act.

But this reasoning creates new difficulties. FOIA requires agencies to produce their records on proper demand, and provides in paragraph (a)(4)(B) that a district court

> has jurisdiction to enjoin the *agency* from *withholding* agency records and to order the production of any agency records *improperly withheld* from the complainant. . . (emphasis added).

Does an agency "withhold" documents when it does not have them? Does the Act give a district court jurisdiction to order the agency to procure the documents? If not, can a

court order parties who are not "agencies" to deliver documents to the agency so the Act will apply?

It is settled that the Act does not require an agency to *create* records, even though this might well serve the public interest in obtaining more information about the agency's actions. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. at 161-62. The logic of *Sears* would appear to apply equally to situations where documents exist, but are not "withheld" because the agency has no capacity to produce them.[14]

The District Court, of course, recognized the Act could not apply unless the State Department first obtained possession of the notes, just as it evidently recognized its lack of authority to order the Department to procure them. But the court thought it could avoid this statutory limitation by invoking its "broad equitable powers" to compel third parties to deliver the notes to the Department so the Act would apply. App. 55a.

The District Court said its solution was supported by this Court's opinion in *Renegotiation Board v. Bannercraft*

[14]The Attorney General and several lower courts have concluded that it does. *See* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23-24 (1967) (the Act "refers, of course, only to records in being and in the possession and control of an agency. . . . [It] imposes no obligation to compile or procure a record in response to a request"); *Nichols v. United States*, 325 F. Supp. 130, 137 (D.Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972) ("the Court may not require production of records not in the custody or control of an agency"); *Ciba-Geigy Corp. v. Mathews*, 428 F. Supp. 523, 531 (S.D.N.Y. 1977) ("the Government cannot be compelled to obtain possession of documents not under its control or to furnish an opinion where none is written"). The District of Columbia Circuit has also noted the logical connection between creating and procuring records. *See Forsham v. Califano*, No. 76-1308, Maj. Op. at 15 (D.C. Cir., July 11, 1978) ("The Freedom of Information Act only gives a right of access to agency records in existence. It does not confer a right to have the government generate agency records, either by creation, subpoena or contract demand").

Clothing Co., 415 U.S. 1 (1974). But *Bannercraft* says nothing whatever about the power of a district court to order an agency to procure a document it does not have, or to order persons not subject to the Act to deliver such documents to an agency.

The documents at issue in *Bannercraft* were official agency records in the custody of the Renegotiation Board. The only question was whether FOIA section 552(a)(4)(B) authorized the district court to enjoin further Board proceedings until such time as the Board produced records it was wrongfully withholding. The Court held the injunction was improper in the case before it because this would interfere with established procedures for renegotiating government contracts. However, it also said that an injunction against withholding documents was not the sole equitable remedy authorized to aid in enforcing the Act. 415 U.S. at 17-20. The District Court below read this passage as a blanket authorization to employ any form of equitable relief which furthered its "role as the 'enforcement arm' of the Freedom of Information Act." App. 55a. We believe this is an egregious misreading of *Bannercraft*.

Respondents had no legally enforceable claim against the State Department, or any right to sue Dr. Kissinger or the Librarian of Congress under FOIA.[15] The District Court had no subject matter jurisdiction under that or any other statute to enter an order against any of these parties. The notion that it could use its "equitable powers" to *create*

[15]Other lower courts have dismissed FOIA complaints against persons who are not "agencies." *See Ciccone v. Waterfront Commission*, 438 F.Supp. 55 (S.D.N.Y. 1977); *Lombardo v. Handler*, 397 F.Supp. 792 (D.D.C. 1975), *aff'd per curiam*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977); *Independent Investor Protective League v. New York Stock Exchange*, 367 F.Supp. 1376 (S.D.N.Y. 1973).

jurisdiction where none exists is nonsense. Remedies derive from rights, not rights from remedies. There is no indication whatever in *Bannercraft* of an intention to abandon this fundamental juridical principle.[16]

The decision below represents a hopeless confusion of ideas. Had respondents sued only Dr. Kissinger and the Librarian, it would have been obvious that they had no standing to act as the State Department's surrogate in asserting an ownership claim the Department did not choose to make. *Cf. Nichols v. United States*, 460 F.2d at 674-75. Had they sued only the State Department, it would have been equally clear they could not use FOIA or mandamus or any other form of action to compel it to assert its ownership interests against Dr. Kissinger. Why respondents' claim is improved by indiscriminately mixing separate claims in a single count was not explained, and in our view cannot be explained.

Respondents' complaints should have been dismissed for failure to state a claim. The refusal to do so raises a substantial question concerning the scope of FOIA, which this Court should review.

[16]This case is concerned not with the Government's authority to recover illegally removed records, but with the authority of FOIA litigants to assert such claims independently of the Government. Dr. Kissinger's successor in office is expressly authorized by 44 U.S.C. §3106 to request the Attorney General to commence suit for recovery of the notes, if he believes they are "unlawfully removed" records of his agency. Respondents plainly have no private right to enforce that statute, either directly, *see Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 976 (1977); *Cort v. Ash*, 422 U.S. 66 (1975), or by mandamus. *See Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972); *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F.Supp. 412 (D. Ala.) (three judge court), *aff'd*, 447 F.2d 1304 (5th Cir. 1971). The District Court acknowledged the existence of the statutory remedy, but ignored its exclusivity and concluded that respondents "need not wait for institution of the statutory retrieval action" when Government action "appears unlikely." App.55a. Why private citizens should be entitled to invoke FOIA to retrieve documents which the responsible agency head does not seek or claim was not explained.

B. The Decision Below Improperly Assumes That FOIA Authorizes *De Novo* Review Of Agency Recordkeeping Determinations And Adopts A Definition Of Agency Records Which Conflicts With The History And Purposes Of The Federal Records Act.

FOIA provides in paragraph (a)(4)(B) that when "agency records" have been "improperly withheld" from a complainant, the court shall

> in such case . . . determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section . . . .

The provision for *de novo* review clearly applies when the agency withholds records on a claim of exemption under subsection (b). *Department of Air Force v. Rose*, 425 U.S. 352, 379 (1976). Does it also apply when the agency has no "records" to "withhold" because it denies the documents the complainant seeks are records? If so, what law should the court apply in making its independent determination that the documents are or are not "agency records"? And how, as a practical matter, can courts make these determinations without detailed knowledge of the agency's operations and needs?

These are serious and substantial questions. FOIA allows any member of the public access to agency records, without regard to the usual standing requirements. It also dispenses, at least in some circumstances, with the traditional rule that a court may not substitute its judgment for that of an

agency unless the agency's action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. If in addition the Act affords private litigants the right of unlimited judicial review of agency recordkeeping determinations, the result will be to thrust courts into the business of deciding what documents an agency should or should not keep in its files. And if courts may, in deciding such questions, define "agency records" by reference to common law property theories, there is serious danger that the records management functions assigned to agencies by the Congress will be subverted. Whether Congress intended such far-reaching consequences requires, we think, more reasoned analysis than the courts below chose to provide.

The Federal Records Act ("FRA") defines "records" in general terms as any documentary materials

> made or received by an agency . . . under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of date in them. . . . 44 U.S.C. §3301.

It also provides that each agency shall have the responsibility for creating an "adequate and proper documentation" of its "essential transactions," 44 U.S.C. §3101, and states that one of the objectives of records management is to "prevent the accumulation of unnecessary records." 44 U.S.C. §2902(3).

The history of this legislation makes clear that FRA places "responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved" as records. H.R. Rep. No. 559, 78th Cong., 1st Sess., *reprinted in* [1943] U.S. Cong. Ser. 2140, 2141. It also makes clear that

> [r]ecords come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, *but first of all to serve the administrative and executive purposes of the organization that creates them.* There is danger of this simple, self-evident fact being lost for lack of emphasis. *The measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization.* S. Rep. No. 2140, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Cong. Ser. 3547, 3550 (emphasis added).

Rules adopted by the State Department under FRA reflect the same concerns.[11] The Department's general policy on records creation recognizes that there is a need both to "insure that important policies, decisions and operations are adequately recorded" and to prevent the "accumulation of unnecessary files." 5 FAM §422.1. Its specific recordkeeping rules repeatedly emphasize that their objective is to record "important," "necessary," "essential," "significant," and "pertinent" information. *See* 5 FAM §§422.1, 423.1, 423.2, 423.2-1, 432. Consistently with that objective, the rules expressly provide that

> [r]ough drafts and working papers, such as preliminary notes, do not constitute required documentation unless they form an integral part of the finished document or show changes in policy. 5 FAM §423.2-8.

[11]The State Department's recordkeeping rules and practices are consistent with those of other federal agencies. *See* National Study Commission, Memorandum of Findings on Existing Custom or Law, Fact and Opinion 75-99 (1977).

These rules confirm what common sense suggests: government employees routinely generate large quantities of written materials which, though made or received in performance of their official duties, are nonetheless not treated as "records." Such "non-record materials" are not filed because they do not constitute "required documentation." Indeed, the Federal Property Management Regulations, which provide guidance to all federal agencies, affirmatively require that

> non-record materials, such as . . . preliminary worksheets and similar papers that need not be made a matter of record, *shall not be incorporated in the official files of the agency.* 41 C.F.R. §101-11.401-3(d) (emphasis added).

The notes of Dr. Kissinger's telephone conversations bear no resemblance to official government records. They are rough, unedited typescripts used only as workaids and never made part of the State Department's records system. They were not intended as permanent records of Dr. Kissinger's official actions, and cannot even be said to be accurate summaries of his conversations. They contain many personal and irrelevant matters which have no place in government files. They are at best "non-record materials" which, though accumulated as part of the records creation process, have no official significance after that process has been completed.

The State Department concluded, on the basis of its regulations and established practices, that the notes were not its records. The opinion of its Legal Adviser explains in detail why that decision was proper. App.65a. When the District Court reached a contrary result, it did not hold the State Department's regulations were invalid, or find that the Department had improperly applied them, or explain why the Legal Adviser's opinion was wrong. It ignored these matters altogether, and held instead that the notes were the

"property of the United States" because they were produced "on government time with the aid of department employees, equipment, materials, and other public resources." App. 58a. This holding rests solely on what the court called "a basic rule of copyright law that work created by an employee within the scope of employment is the property of the employer." App.56a.

This conclusion cannot even be accepted as an adequate statement of the "basic rule" it purports to apply.[18] But the question for this Court is whether FOIA authorizes federal judges so lightly to disregard agency rules, practices and decisions as they relate to recordkeeping. We believe the comprehensive scheme which Congress created for records management matters, the history of that legislation, and the widespread practice of agencies in treating various types of informal documents as "non-record materials," all demonstrate that no such result can be justified.[19]

---

[18]The copyright cases the District Court cites make clear that the underlying question is whether the employee had an express or implied contractual obligation to create the contested literary or artistic work for his employer's use. *See, e.g., Schorr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970). Whether Dr. Kissinger had an obligation to create the notes can only be determined by reference to the Department's rules and practices. Dr. Kissinger's duty as a government employee was to document his significant oral decisions, commitments and discussions. 5 FAM §423.2-1. This he did — not with the notes but with memoranda and other official documents and with the extracts he later made from the notes to assure completeness of the official files. The notes used in the preliminary stages of this documentation process were of no interest to his "employer," and he was free under the Department's interpretation of the employment relation to retain or discard them as he chose.

[19]FOIA has been amended twice, in 1974 and again in 1976. In neither case did Congress authorize private citizens to challenge agency recordkeeping determinations. The same committees that considered these amendments were simultaneously at work on the substantial revisions to FRA which were adopted in 1976. These revisions contain

FOIA assumes the existence of "agency records," without defining what they are, because Congress expected the agencies to make that determination. If an agency has classified a document as a record, it must produce it on proper demand unless one or more of the FOIA exemptions justifies its being withheld. The agency's claim of exemption is subject to *de novo* review, but the agency's decision to create a record or to procure a record or to file a document as a record is not. *Cf. Lybarger v. Cardwell*, 557 F.2d 764, 766-67 (1st Cir. 1978). FOIA — despite its important public information function — was never intended as a device to usurp agency recordkeeping decisions. "Agency records" means documents an agency has chosen to incorporate into its records system — not documents that journalists, historians, political scientists or other members of the general public think the agency should have in its files.

The State Department's decision here was based on an application of its own rules, as it interpreted them. That decision should have been accepted unless found to be arbitrary, capricious or contrary to law. *Udall v. Tallman*, 380 U.S. 1 (1965). No such finding was made. Even if FOIA implies some standard of review less restrictive than is

no hint that agency recordkeeping decisions should be subject to judicial review at the instance of private citizens. In 1974, these same committees considered, and Congress adopted, the Privacy Act. 5 U.S.C. §552a. This statute — unlike FOIA and FRA — expressly permits a private citizen to request amendment of records relating to him, and provides for *de novo* review of an agency's refusal to grant the request. *See* 5 U.S.C. §§552a(d)(2)(b)(1); 552a(g)(1)(2)(A).

The careful and essentially contemporaneous consideration which has been given to these three interrelated statutes shows that Congress knew how to provide for judicial review of agency recordkeeping determinations when it wished to do so. It also belies any suggestion that FOIA was intended to afford private citizens with a virtually unlimited right to contest such determinations in situations far removed from the limited circumstances defined in the Privacy Act.

usually required, it could not possibly authorize a court to ignore an agency's determination altogether. Yet that is what happened here. And it is inconceivable that the Act could ever justify the conclusion below that analogies to copyright law provide a better measure of what records are than agency regulations adopted pursuant to the Federal Records Act.[20] FOIA applies to "agency records"; it does not apply to "property" even if the "property" is documentary material.[21]

The District Court's analysis of the issues is plainly inadequate. The Court of Appeals did not choose to address them. We ask this Court to provide the mature consideration these important questions of federal law deserve, but have not as yet received.

[20]None of the lower courts that have been called upon to interpret the term "agency records" as used in FOIA has ever thought the common law is the proper source to consult for an answer. *See DiViaio v. Kelley*, 571 F.2d 538 (10th Cir. 1978); *Nichols v. United States*, 325 F.Supp. 130 (D. Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972); *Save The Dolphins v. Department of Commerce*, 404 F.Supp. 407 (N.D. Cal. 1975); *Porter County Chapter of the Izaak Walton League v. AEC*, 380 F. Supp. 630 (N.D. Ind. 1974).

[21]The District Court's conclusion on this point has other disturbing implications. The rationale adopted below — that any document produced by a federal employee on government time is government property — applies with equal force to unofficial but work-related papers created by Executive branch employees, by the President and Vice-President, by Congressmen, and by members of the Judiciary. Some of these federal employees have, like cabinet officers, donated collections of papers to libraries with no suspicion whatever that the act of donation represented an illegal alienation of government property. *See* note 8, *supra*. If the decision below stands, all restrictive covenants relating to such donations are vulnerable to challenge on the theory that the donor did not "own" the papers and thus had no right to control the manner of their disposition. *See Nixon v. Sampson*, 389 F.Supp. 107, 120-23, 133-45 (D.D.C.), *stayed sub nom. Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975), *dismissed as moot*, 437 F.Supp. 654 (D.D.C. 1977), *reversed and remanded for trial*, No. 77-2123 (D.C. Cir., Dec. 21, 1978).

C. The Decision Below Invades Constitutional Rights of Privacy.

The decision below also raises serious questions of constitutional law — questions that affect not only Dr. Kissinger but also many other past and present government employees.

Government employees, like other citizens, have — or ought to have — a right to think, to explore, to discard, to develop ideas without fear that their thoughts will be prematurely published. Agency recordkeeping rules and practices recognize this fundamental right.

Agencies require employees to document decisions, commitments and significant discussions, *see* 5 FAM §423.2-1; 41 C.F.R. §101-11.202-2(b), but they do not require that every thought and every utterance be recorded. Rough drafts and working papers are not records; preliminary notes are not records; uncirculated papers filed as personal are not records. Such documents are not available to other employees unless the author commits them to the official files.

Agencies permit employees to keep personal papers in their offices, and to remove them when they retire or change positions. *See* 5 FAM §§432, 417.1; 41 CFR §§101-11.202-2(d), 101-11.406-6(c). Agencies may discipline employees who fail to keep proper records of their activities; they do not, however, search for records in their employees' desk drawers and private files. Unfiled and uncirculated papers are presumptively private; they may not be inspected by anyone unless constitutional procedures are followed.[22]

[22]Respondents argued below that Dr. Kissinger should have submitted the telephone notes — which were stored in his personal files — for review by the Department's records officers before removal. There is no such requirement. The Department's regulations expressly recognize that papers which have been "explicitly designated and filed as personal at the time of origin or receipt may be removed. . . without approval of the Director, Foreign Affairs Document and Reference Center." 5 FAM §417.1a. The Department's chief administrative officers — including the Director of FADRC— knew the telephone notes were in Dr. Kissinger's personal files when those files were transferred to the Library of Congress. JA 273. Each expressly approved the transfer. App. 81a, 83a.

In *Porter County Chapter of the Izaak Walton League v. AEC*, 380 F.Supp. 630 (N.D.Ind. 1974) — a case the courts below chose to ignore — the issue was whether notes made by Atomic Energy Commission staff members "[i]n executing their responsibilities relating to AEC's health and safety environmental reviews," *id.* at 633, were "agency records" subject to the Act. The court held they were not:

> Such materials are not circulated to nor used by anyone other than the authors, and are discarded or retained at the author's sole discretion for their own individual purposes in their own personal files. The AEC does not in any way consider such documents to be "agency records", nor is there any indication . . . that anyone other than the author exercises any control over such documents.
>
> . . . [T]he Court finds that these materials are personal notes, rather than agency records. Disclosure of such personal documents would invade the privacy of and impede the working habits of individual staff members; it would preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to disseminate publicly. . . . [T]heir disclosure would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials. *Id.*

It is undisputed here that some of the telephone notes contain purely personal conversations having no connection

with government business. Other notes, though business-related, reflect personal observations, thoughts, opinions, and beliefs. Many also include expressions of privately held views about politics, personal details concerning third parties, and information relating to Dr. Kissinger's associations with individuals and organizations. This is equally true of statements made by those with whom he spoke. Such matters have no place in public records.

Dr. Kissinger had no duty to make notes of his telephone conversations. His decision to make and keep them was predicated on the belief that they were private papers — a belief which was consistent with the State Department's rules, policies and practices. If the position adopted by the courts below had been the law when he was in office, he either would not have made the notes at all or would have edited and corrected them before they were filed as official records. The retroactive — and unprecedented — decision below that these papers are "agency records" frustrates Dr. Kissinger's legitimate expectations of privacy. No court should tolerate such a result.[23]

The District Court's order raises even more serious questions. Although the District Court acknowledged that the notes were "personal in some respects," App. 58a, it nonetheless directed the State Department to possess and read all of them. None — regardless of content — is to be returned. This procedure would not have been available under the State Department's own regulations and, indeed,

[23]The Final Report of the National Study Commission recommends that Congress adopt legislation to clarify ambiguities in current practices concerning the right of agency officials to retain non-record materials. National Study Commission, Final Report 19, 32-33 (1977). However, it stresses that any such legislation should be made prospective to "avoid legal problems. . . and provide notice to Federal Officials as to changes necessary to comply with the recommendations." *Id.* at 8. The Commission's sensible — and sensitive — approach sharply contrasts with the total disregard for privacy rights that is reflected in the decision below. *See Id.* at 124.

would have been unconstitutional had the Department attempted it when Dr. Kissinger was its employee. It is no less unconstitutional when ordered by a court.

Respondents argued below that this Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), could justify seizure and processing of the notes so they would become available for public disclosure under FOIA.[24] The District Court cited no authority to support its order. If *Nixon* was, indeed, its inspiration, we believe the court misapplied it.

Nixon sustained the constitutionality of special legislation which applied only to the former President "as a legitimate class of one." 433 U.S. at 472, 486, 491. This Court held in *Nixon* that the intrusion into privacy which the legislation made necessary did not for that reason invalidate it, because this was the least intrusive means of accomplishing national interests of overriding importance. *Id.* at 456-57, 467. It certainly did *not* hold that inspection of private papers by government employees is appropriate in any and all cases involving former public officials.

The rationale of *Nixon* has no application here. Here, the Government does not claim the documents. Here, no criminal laws are involved. And here, no provision has been made for the return of admittedly private and personal materials. There is no precedent or justification for seizing, searching and retaining any of the notes. The order entered below is supported neither by *Nixon* nor by any other judicial decision. It is unconstitutional and it should be set aside.

[24]No other authority was cited, because none exists. The general rule in civil cases is that a party need deliver only those documents "relevant in purpose" to the inquiry after his own review of the documents. *See v. City of Seattle*, 387 U.S. 541, 544 (1967); *In re Horowitz*, 482 F.2d 72, 78 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). Disputed documents must be reviewed by an impartial judicial officer, not an Executive branch employee. No court has ever held that private citizens may compel another private citizen to submit his papers for Executive branch review in order to facilitate their desire to read them.

CONCLUSION

That Dr. Kissinger kept notes of his telephone conversations is not unusual; senior government officials have for decades followed the same practice. Nor is it unusual that the notes were kept in private files; materials of this type have always been treated by the State Department and by other agencies as personal papers which the authors could discard or retain at their discretion.

When Dr. Kissinger left office, he did not simply remove his private files and do with them as he pleased. Instead, he donated his personal papers and other documents relating to his years in government to the Library of Congress so that the entire record of his period would be collected in one place for the convenience of future scholars. This was done openly, with the knowledge and approval of the State Department's principal administrative officers and in full compliance with its rules and policies.

Respondents candidly admitted below that their reason for instituting this lawsuit was to gain access to what they characterized as an "invaluable" collection of "background materials" on American foreign and domestic policy. That respondents want access to the notes is perhaps understandable, if short-sighted.[25] But the

[25]The decision below, if sustained, is unlikely to enhance the long-range interests of history. As a prominent historian recently said:

> [s]ome of the republic's most precious historical sources have been the diaries . . . of cabinet ministers from Gideon Welles and Salmon P. Chase to Harold Ickes and Henry Wallace — diaries bearing on the discharge of official duties, written on government foolscap or dictated to government secretaries, often no doubt during working hours. The Smith standard, by making these invaluable documents the property of the state, not of the person who, beyond any official requirement, kept them, would thereby insure that they would never have been kept . . . . Surely, it would be better for historians to wait a few years and have this valuable collection than, by insisting on immediate access, discourage all Kissinger's successors from following his example.

Statement of Arthur Schlesinger, Jr., before the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations 2-4 (March 2, 1978).

question here is whether FOIA supports their claim. We think it does not. FOIA applies to "agency records" — not to "background materials" or to personal papers.

The notes now belong to the United States by reason of Dr. Kissinger's voluntary gift to the Library of Congress. They will become publicly available when the privacy interests of Dr. Kissinger and those with whom he spoke no longer require protection, and when the whole historical record of Dr. Kissinger's time in government can be viewed dispassionately. That the notes may contain materials which respondents would like to read — or might profit by reading — provides no reason to twist the law or the Constitution.

We ask this Court to grant certiorari so that the important questions here presented may be reviewed and decided in accordance with the law.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1088

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

HENRY A. KISSINGER,

Petitioner,

v.

MILITARY AUDIT PROJECT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner

be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in

which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction

to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was

primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made

promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) con-

stitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive

department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

PRIVACY ACT OF 1974, 5 U.S.C. § 552a

§ 552a. Records maintained on individuals

(a) Definitions. — For purposes of this section —

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a

purpose which is compatible with the purpose for which it was collected.

* * *

(d) Access to records. — Each agency that maintains a system of records shall —

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and —

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either —

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

* * *

(g)(1) Civil remedies — Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's

record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the

agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so

misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

FEDERAL RECORDS ACT AND RELATED LAWS
44 U.S.C. §2111, 44 U.S.C. Chapters 29, 31, and 33.

§ 2111. Reports: correction of violations

(a) When the Administrator of General Services considers it necessary, he may obtain reports from Federal agencies on their activities under chapters 21, 25, 27, 29, 31, and 33 of this title.

(b) When the Administrator finds that a provision of chapter 21, 25, 27, 29, 31, or 33 of this title has been or is being violated, he shall inform in writing the head of the agency concerned of the violation and make recommendations for its correction. Unless corrective measures satisfactory to the Administrator are inaugurated within a reasonable time, the Administrator shall submit a written report of the matter to the President and the Congress.

* * *

Chapter 29.—Records Management By Administrator of General Services

§ 2901. Definitions

As used in this chapter, and chapters 21, 25, 27, 31, and 33 of this title —

(1) the term "records" has the meaning given it by section 3301 of this title;

(2) the term "records management" means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition;

(3) the term "records creation" means the production or reproduction of any record;

(4) the term "records maintenance and use" means any activity involving —

(A) location of records of a Federal agency;

(B) storage, retrieval, and handling of records kept at office file locations by or for a Federal agency;

(C) processing of mail by a Federal agency; or

(D) selection and utilization of equipment and supplies associated with records and copying;

(5) the term "records disposition" means any activity with respect to—

(A) disposal of temporary records no longer necessary for the conduct of business by destruction or donation;

(B) transfer of records to Federal agency storage facilities or records centers;

(C) transfer to the National Archives of the United States of records determined to have sufficient historical or other value to warrant continued preservation; or

(D) transfer of records from one Federal agency to any other Federal agency;

(6) the term "records center" means an establishment maintained and operated by the Administrator or by another Federal agency primarily for the storage, servicing, security and processing of records which need to be preserved for varying periods of time and need not be retained in office equipment or space;

(7) the term "records management study" means an investigation and analysis of any Federal agency records, or records management practices or programs (whether manual or automated), with a view toward

rendering findings and recommendations with respect thereto;

(8) the term "inspection" means reviewing any Federal agency's records or records management practices or programs with respect to effectiveness and compliance with records management laws and making necessary recommendations for correction or improvement of records management;

(9) the term "servicing" means making available for use information in records and other materials in the custody of the Administrator, or in a records center —

(A) by furnishing the records or other materials, or information from them, or copies or reproductions thereof, to any Federal agency for official use, or to the public; or

(B) by making and furnishing authenticated or unauthenticated copies or reproductions of the records or other materials;

(10) the term "unauthenticated copies" means exact copies or reproductions of records or other materials that are not certified as such under seal and that need not be legally accepted as evidence;

(11) the term "National Archives of the United States" means those official records which have been determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the Federal Government, and which have been accepted by the Administrator for deposit in his custody;

(12) the term "Administrator" means the Administrator of General Services;

(13) the terms "executive agency" and "Federal

agency" shall have the meanings given such terms by subsections (a) and (b), respectively, of section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472(a) and (b)).

§ 2902. Objectives of records management

It is the purpose of this chapter, and chapters 21, 31, and 33 of this title, to require the establishment of standards and procedures to assure efficient and effective records management. Such records management standards and procedures shall seek to implement the following goals:

(1) Accurate and complete documentation of the policies and transactions of the Federal Government.

(2) Control of the quantity and quality of records produced by the Federal Government.

(3) Establishment and maintenance of mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records and with respect to the effective and economical operations of an agency.

(4) Simplification of the activities, systems, and processes of records creation and of records maintenance and use.

(5) Judicious preservation and disposal of records.

(6) Direction of continuing attention on records from their initial creation to their final disposition, with particular emphasis on the prevention of unnecessary Federal paperwork.

(7) Establishment and maintenance of such other systems or techniques as the Administrator considers necessary to carry out the purposes of this chapter and chapters 21, 31, and 33 of this title.

* * *

§ 2904. General responsibilities of Administrator

The Administrator shall provide guidance and assistance to Federal agencies with respect to records creation, records maintenance and use, and records disposition. In providing such guidance and assistance, the Administrator shall have responsibility to—

(1) promote economy and efficiency in the selection and utilization of space, staff, equipment, and supplies for records management;

(2) promulgate standards, procedures, and guidelines with respect to records management and records management studies;

(3) conduct research with respect to the improvement of records management practices and programs;

(4) serve as a clearinghouse for information with respect to records management and as a central source for reference and training materials with respect to records management;

(5) establish such interagency committees and boards as may be necessary to provide an exchange of information among Federal agencies with respect to records management;

(6) disseminate information with respect to technological development in records mangement;

(7) direct the continuing attention of Federal agencies and the Congress on the burden placed on the Federal Government by unnecessary paperwork, and on the need for adequate policies governing records creation, maintenance and use, and disposition;

(8) conduct records management studies and, in his discretion, designate the heads of executive agencies to

conduct records management studies with respect to establishing systems and techniques designed to save time and effort in records management, with particular attention given to standards and procedures governing records creation;

(9) conduct inspections or records management studies which involve a review of the programs and practices of more than one Federal agency and which examine interaction among and relationships between Federal agencies with respect to records and records management; and

(10) report to the Congress and to the Director of the Office of Management and Budget each year, at such time or times as he may deem desirable, on the results of the foregoing activities, including evaluations of responses by Federal agencies to any recommendations resulting from studies or inspections conducted by him.

§ 2905. Establishment of standards for selective retention of records; security measures

The Administrator of General Services shall establish standards for the selective retention of records of continuing value, and assist Federal agencies in applying the standards to records in their custody. He shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency that shall come to his attention, and assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law.

§ 2906. Inspection of agency records

(a)(1) In carrying out his duties and responsibilities under this chapter, the Administrator of General Services or his designee may inspect the records or the records management practices and programs of any Federal agency solely for the purpose of rendering recommendations for the improvement of records management, practices and programs. Officers and employees of such agencies shall cooperate fully in such inspections, subject to the provisions of paragraphs (2) and (3) of this subsection.

(2) Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected, in accordance with regulations promulgated by the Administrator, subject to the approval of the head of the agency concerned or of the President.

(3) If the Administrator or his designee inspects a record, as provided in this subsection, which is contained in a system of records which is subject to section 552a of title 5, such record shall be—

(A) maintained by the Administrator or his designee as a record contained in a system of records; or

(B) deemed to be a record contained in a system of records for purposes of subsections (b), (c), and (i) of section 552a of title 5.

(b) In conducting the inspection of agency records provided for in subsection (a) of this section, the Administrator or his designee shall, in addition to complying with the provisions of law cited in subsection (a) (3), comply with all other Federal laws and be subject to the sanctions provided therein.

* * *

Chapter 31 — Records Management By Federal Agencies

§ 3101. Records management by agency heads; general duties

The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

§ 3102. Establishment of program of management

The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for

(1) effective controls over the creation and over the maintenance and use of records in the conduct of current business;

(2) cooperation with the Administrator of General Services in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value; and

(3) compliance with sections 2101-2113, 2501-2507, 2701, 2901-2909, and 3101-3107, of this title and the regulations issued under them.

* * *

§ 3105. Safeguards

The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Administrator of General Services. Safeguards shall include making it known to officials and employees of the agency —

(1) that records in the custody of the agency are not to be alienated or destroyed except in accordance with sections 3301-3314 of this title, and

(2) the penalties provided by law for the unlawful removal or destruction of records.

§ 3106. Unlawful removal, destruction of records

The head of each Federal agency shall notify the Administrator of General Services of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Administrator shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody.

* * *

Chapter 33. — Disposal of Records

§ 3301. Definition of records

As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in con-

nection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

§ 3302. Regulations covering lists of records for disposal, procedure for disposal, and standards for reproduction

The Administrator of General Services shall promulgate regulations, not inconsistent with this chapter, establishing—

(1) procedures for the compiling and submitting to him of lists and schedules of records proposed for disposal,

(2) procedures for the disposal of records authorized for disposal, and

(3) standards for the reproduction of records by photographic or microphotographic processes with a view to the disposal of the original records.

§ 3303. Lists and schedules of records to be submitted to Administrator of General Services by head of each Government agency

The head of each agency of the United States Government shall submit to the Administrator of General Services, under regulations promulgated as provided by section 3302 of this title—

(1) lists of any records in the custody of the agency that have been photographed or microphotographed under the regulations and that, as a consequence, do

not appear to have sufficient value to warrant their further preservation by the Government;

(2) lists of other records in the custody of the agency not needed by it in the transaction of its current business and that do not appear to have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government; and

(3) schedules proposing the disposal after the lapse of specified periods of time of records of a specified form or character that either have accumulated in the custody of the agency or may accumulate after the submission of the schedules and apparently will not after the lapse of the period specified have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government.

* * *

§ 3314. Procedures for disposal of records exclusive

The procedures prescribed by this chapter are exclusive and records of the United States Government may not be alienated or destroyed except under this chapter.

FEDERAL PROPERTY MANAGEMENT REGULATIONS
41 C.F.R. Part 101-11

Part 101-11—Records Management

§ 101-11.000 Scope of part.

This part prescribes policies and promulgates standards, procedures, and techniques for the economical and efficient management of records of Federal agencies.

Subpart 101-11.1—Federal Records; General

* * *

§ 101-11.102 Agency records management programs.

§ 101-11.102-1 Authority.

Section 506(b) of the Federal Records Act of 1950 (44 U.S.C. 396(b)) requires the head of each Federal agency to establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.

§ 101-11.102-2 Program content.

Agency programs shall, among other things, provide for:

(a) Effective controls over the creation, the organization, maintenance and use, and the disposition of all agency records.

(b) Cooperation with GSA in developing and applying standards, procedures, and techniques designed to improve the management of records, assure the maintenance and security of records of continuing value, and facilitate the segregation and disposal of all records of temporary value.

(c) Compliance with the provisions of the Federal Records Act of 1950 and with the regulations issued thereun-

(d) Compliance with § 101-25.104-2 in connection with the moratorium on the purchase of new filing cabinets.

§ 101-11.102-3 Creation of records.

Adequate records management controls over the creation of agency records shall be instituted to insure that important policies and decisions are adequately recorded; that routine operational paper work is kept to a minimum; and that the accumulation of unnecessary files is prevented. Effective techniques to be applied in this area include the application of systems for the control of correspondence, forms, directives and issuances, and reports; the minimizing of duplicate files; and the disposal without filing of transitory material that has no value for record purposes.

* * *

§ 101-11.103 Agency program evaluation.

§ 101-11.103-1 Authority.

Section 505(c) of the Federal Records Act of 1950 (44 U.S.C. 395(c)) authorizes the Administrator of General Services to inspect or survey, personally or by deputy, the records of any Federal agency, as well as to make surveys of records management and records disposal practices in such agencies.

§ 101-11.103-2 Evaluation by National Archives and Records Service.

Agency programs for controlling the creation, maintenance, and use of current records; for the selective retention of records of continuing value; and for the disposal of noncurrent records will be inspected periodically by the

National Archives and Records Service. The objectives of these inspections are to:

(a) Determine agency compliance with the provisions of the Records Disposal Act and the Federal Records Act of 1950.

(b) Determine agency observance of the regulations set forth in this Subpart 101-11.1.

(c) Evaluate the effectiveness of agency records management programs.

* * *

§ 101-11.202 Adequate and proper documentation.

§ 101-11.202-1 Statutory responsibilities.

(a) Section 505(a) of the Federal Records Act of 1950 (44 U.S.C. 395(a), vests in the Administrator of General Services responsibility for developing and issuing standards to improve the management of records.

(b) Section 506(a) of the Federal Records Act of 1950 (44 U.S.C. 396(a)) requires that the head of each Federal agency "shall cause to be made and preserved records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities."

§ 101-11.202-2 Documentation standards.

To insure that adequate and proper records are made and preserved in the Federal Government, the following documentation standards will apply in each Federal agency:

(a) The record of the transaction of public business by any Federal official or employee is to be complete to the extent required (1) to facilitate informal action by the incumbents

and their successors in office; (2) to make possible a proper scrutiny by the Congress, other duly authorized agencies of the Government, and other persons properly and directly concerned, of the manner in which public business has been discharged; and (3) to protect the financial, legal, and other rights of the Government and of persons affected by the Government's actions.

(b) With particular regard to the formulation and execution of basic Government policy, Federal officials are responsible for incorporating in the records of their agencies all essential information on their major actions. Significant decisions and commitments reached orally (person to person, by telephone, or in conference) should be reduced to writing and included in the record. Minutes should be taken at important board, committee, and staff meetings, and these, together with a copy of the agenda and all documents considered at or resulting from such meetings, should be made a part of the record.

(c) The programs, policies, and procedures of Federal agencies are to be adequately documented in appropriate directives. A record copy of each such directive (including those superseded) will be maintained as a part of the official files.

(d) Papers of a private or nonofficial character which pertain only to an individual's personal affairs that are kept in the office of a Federal official will be clearly designated by him as nonofficial and will at all times be filed separately from the official records of his office. In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files (see § 101-11.406-6).

* * *

§ 101-11.203-2 General requirements.

Positive action is to be taken to prevent the making of unnecessary records. Existing and proposed office procedures are to be subject to continuing examination by agency management with a view to determining their effect on recordmaking. Where justified, such procedures will be revised, consolidated, or eliminated to keep recordmaking to a minimum. In addition, the detailed program requirements for correspondence, reports, forms, directives management, and ADP records management set forth in the following sections of this subpart are to be observed.

* * *

§ 101-11.401-3 Formulation of records control schedules.

The following steps shall be taken in the development of records control schedules:

(a) Each Federal agency shall compile and maintain on a current basis a records control schedule for all major groups of records in its custody having importance in terms of content, bulk, or space and equipment occupied. For all newly created Federal agencies such schedules shall be completed within 1 year after creation of the agency.

(b) Schedules shall clearly identify and describe the series of records covered, and shall contain instructions that, when approved, can be readily applied. Schedules must be readily adaptable to use along organizational lines so that each office will have standing instructions for the disposition or retention of records in its custody.

(c) All schedules shall take into account the actual filing arrangements in existence, so that disposition of records can be physically accomplished in the largest blocks possible.

(d) Nonrecord materials, such as extra copies of documents preserved for convenience of reference, stocks of processed documents, preliminary worksheets, and similar

papers that need not be made a matter of record, shall not be incorporated in the official files of the agency. To the maximum extent possible, material not required for record purposes shall be disposed of; it should not be sent to file. In cases where transitory files of such materials are established and maintained in filing equipment, such files shall be controlled by means of instructions in the records control schedule.

(e) Schedules shall be reviewed at least once annually to effect changes necessary to maintain their current status.

* * *

§ 101-11.406-6 Mutilation and Destruction of Records.

(a) The Administrator and the heads of Federal agencies are responsible for preventing the unlawful removal, defacing, alteration, or destruction of records (44 U.S.C. 2905, 3106).

(b) The penalties for the willful and unlawful destruction, damage, or alienation of Federal records are contained in the U.S. Criminal Code (18 U.S.C. 2071).

(c) Private files are not governed by these provisions.

DEPARTMENT OF STATE RECORDS MANAGEMENT RULES 5 Foreign Affairs Manual Part 400

410 General Program

The regulations set forth in this chapter establish the basis for an active, continuing program for the effective and economical management of records within the Department of State and all of its component elements in the United States and abroad, as required by Federal statutes and regulations. As used herein, the term "Department" or "Departmental" covers personnel and records of the Department at Washington, D.C., and its domestic field offices in the United States; and the term "post(s)" covers personnel and records located at posts throughout the world and U.S. missions to international organizations, regardless of their geographical location.

411 Legislation and Regulations

411.1 Federal Records Act of 1950

The Federal Records Act of 1950, as amended (44 U.S.C. 3101-3107), requires the establishment of a records management program. The act also provides that "The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Administrator of General Services. Safeguards shall include making it known to officials and employees of the agency (1) that records in the custody of the agency are not to be alienated or destroyed except in accordance with the provisions of sections 3301-3314 of this title, and (2) the penalties provided by law for the unlawful removal or destruction of records." The act requires the Administrator of General Services to be notified "of any actual, impending, or threatened unlawful removal, defacing, alteration, or

destruction of records in the custody of the agency. . ." Regulations implementing the provisions of the act regarding removal of records are contained in section 417.

* * *

411.4 Federal Property Management Regulations (Subchapter B, Archives and Records)

The Federal Property Management Regulations, which apply to all Federal agencies, are issued by the General Services Administration. They establish the basic procedures and standards applicable to records and paperwork management. Those which are pertinent to the Department of State and its component elements are incorporated in these regulations.

* * *

413 Program Content

The Department's records management program provides for:

a. Effective controls over the creation, organization, maintenance, use, and disposition of all agency records.

b. Cooperation with GSA in developing and applying standards, procedures, and techniques designed to improve the management of records, assure the maintenance and security of records of continuing value, and facilitate the segregation and disposal of all records of only temporary value.

c. Compliance with the provisions of the Federal Records Act of 1950, as amended, and with the regulations issued thereunder.

d. Compliance with GSA regulations issued in connection with the President's moratorium on the purchase of new file cabinets.

414 Scope and Responsibility

414.1 Records Management Program

The records management program of the Department applies to all records produced, acquired, or maintained throughout the Department and posts. The Foreign Affairs Document and Reference Center (O/FADRC) is responsible for the staff supervision, coordination, and direction of the following functions: files management, records equipment and supplies management, records disposition, forms management (6 FAM 1350), administrative reports management (2 FAM 140, 1230), correspondence management (sections 100 and 200), directives management (2 FAM 1100), and mail flow and procedural studies.

Other functions of O/FADRC include maintenance and operation of the central automated document storage and retrieval system and its predecessor, the central foreign policy file (section 434.1); operating the Records Service Center (FADRC/RSC) (section 444); directing the vital records program (section 460); providing authentications services (2 FAM 1290); and developing standards to assure:

a. Adequate and proper documentation of the Department's activities;

b. Creation of only those records essential to the conduct of current business; and

c. The efficient and economical management of all types of records, including automated data processing records.

* * *

417 Removal of Records

417.1 Legal Restrictions

To implement the legal restrictions against the removal of records by any employee leaving the service of a Federal

agency, as set forth in the Federal Records Act of 1950, as amended (see section 411.1), the following regulations and procedures apply within the Department of State and its component elements:

a. No papers kept in an employee's office that have not been explicitly designated or filed as personal at the time of origin or receipt may be removed from the Department or a post when the employee resigns, transfers to another Federal agency, or is otherwise separated from the Department or the Foreign Service, or at any other time, without the approval of the Director, Foreign Affairs Document and Reference Center.

b. In the case of papers not explicitly designated as personal at the time of origin or receipt, or filed as such, that contain both personal and official matter, the Director, Foreign Affairs Document and Reference Center, may require extracts to be prepared of the official contents for incorporation in the records of the Department or post concerned.

c. Unclassified documents relating to the performance of an employee's official duties may be copied and privately retained by an employee if approved by the Director, Foreign Affairs Document and Reference Center.

417.2 Responsibility of Administrative Office

The administrative section of each Departmental office or bureau and of each post has the responsibility for the following actions:

(1) Reminding officials of the rank of assistant secretary and above, or rank of ambassador, who are about to leave the Department or the Foreign Service, of the laws and regulations pertaining to the removal of records (sections 411 and 417).

(2) Insuring that a JF-4, Security Acknowledgment, executed by each incoming official, and a JF-3, Separation

Statement, executed by each departing official, are filed in the official's personnel folder (see 3 FAM 780).

(3) Suggesting to these departing officials the desirability of consulting with National Archives representatives about depositing personal papers that might be of historical interest in the National Archives or a Presidential archival depository, where specific restrictions may be placed on access to such papers.

* * *

420 Records Creation

421 Legal Requirements

The Federal Records Act of 1950, as amended (44 U.S.C. 3101-3102), requires the head of each Federal agency to (a) assure the making and preserving of records "containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency"; and (b) provide for "effective controls over the creation . . . . of records in the conduct of current business."

422 Control

422.1 Policy

Certain controls over the creation of records are essential to insure that important policies, decisions, and operations are adequately recorded, routine paperwork is kept to a minimum, and the accumulation of unnecessary files is prevented. Standards and techniques for achieving economy and efficiency in the creation of records, including correspondence, reports, forms, and directives, shall be developed in accordance with the general criteria set forth in regulations and handbooks issued by the General Services Administration.

422.2 General Methods and Procedures

The following methods and procedures should be followed by all offices on a continuing basis:

a. Survey of Office Procedures

All existing and proposed office procedures should be subject to continuing examination for their effect on record-keeping. Wherever possible, such procedures should be revised, consolidated, or eliminated to prevent the creation of unnecessary records.

b. Elimination of Duplicate Files

Every bureau, office, and post should take positive action to prevent the establishment of, or to eliminate, duplicate files not required for current operating purposes. Proliferation of individual office working files can be controlled through careful planning at the division or branch level and maximum use of the central foreign policy file and the automated document storage and retrieval system in O/FARDRC.

c. Limitation on Number of Copies

The number of copies of communications and other documents reproduced and distributed should be limited to those required on a strict need-to-know basis. To the extent feasible, control should be exercised over office copying equipment to prevent the reproduction of unnecessary copies. As a general rule, information copies of communications should not be filed with official records but rather maintained in a chronological, post, or other temporary file which is retained for only a short period of time.

422.3 Specialized Programs

There are four types of records which require specialized programs for their control: forms, reports, correspondence, and directives. The regulations and procedures covering

these programs are as follows: forms, 6 FAM 1350; reports, 2 FAM 140; correspondence, 5 FAM 100, 200, and the Correspondence Handbook; and directives, 2 FAM 1100.

423 Documentation

423.1 Adequacy

The recording of activities of officials of the Department of State and all of its component elements should be complete to the extent necessary to (a) facilitate the making of decisions and policies and the taking of actions by the incumbents and their successors in office; (b) fulfill the requirements of Federal statutes; (c) make possible a proper scrutiny, by the Congress and by other duly authorized agencies of the Government, of the manner in which the functions of the Department of State have been discharged; (d) protect the financial, legal, and other rights of the Government and of persons affected by actions of the Department of State; and (e) provide materials for research and historical purposes.

423.2 Types

In connection with the performance of functions assigned to the Department of State, all essential information must be made a part of its documentation. A large portion of this documentation will be in the established communications forms, such as telegrams, airgrams, letters, memorandums, and diplomatic notes. In addition, the following types of transactions and records also constitute official agency documentation:

423.2-1 Oral Transactions

Decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record. The information should

be written in the form of aide-memoire, memorandums of conversation, or memorandums to the file.

423.2-2 Treaties, Conventions, and Other International Agreements

The signed originals or certified copies of treaties, conventions, and other international agreements effected by exchanges of diplomatic notes, and also full powers and other documents authorizing signature, resolutions of approval of treaties by the Senate, ratifications, notifications of adherence or approval, proclamations of treaties and other international agreements by the President, protocols of exchange or deposit of ratifications, and notifications of termination are part of the Department's documentation. Also included are original documents of formal negotiations conducted by officials of the Department, delegates to international conferences, or by delegates to international organizations in which the U.S. Government participates.

423.2-3 Committee and Conference Documentation

Decisions and commitments on U.S. foreign policy are reached through participation in Departmental, interdepartmental, and international committees and in U.S. governmental, national, and international conferences and organizations. Committee and conference documentation pertaining to this participation should include agenda and minutes of each meeting; documents considered or presented for consideration; reports and other documents resulting from the meetings; records created by or for Departmental or U.S. Government participation before or during the meetings; and records resulting from the implementation of decisions and commitments.

423.2-4 Position Papers, Briefing Books, and Background Data

Position papers (whether used or not), briefing books, and other background data are part of the documentation of the Department's activities. Each item should indicate clearly the meeting or purpose for which it was prepared. A master copy of each is a part of the Department's records.

423.2-5 Special Missions

Activities of any missions either established by or responsible to the Department or post for carrying out special assignments should be fully documented. This documentation should cover the establishment and functioning of the mission and the implementation of its recommendations.

423.2-6 Regulations, Directives, Delegations, etc.

Programs, policies, and procedures, and organizational changes of the Department of State should be adequately documented in regulations, directives, circulars, delegations of authority, designations, legal opinions, and similar material. A master set of each shall be maintained as a part of the Department's records.

423.2-7 Reports and Studies

Reports and studies prepared by Departmental or post personnel or at the request of the Department or any post for its use are a part of the documentation of its activities. Master sets of all such reports and studies are to be maintained as a part of the Department's records. One copy will be sent to the Document and Reference Division (FADRC/DR) for centralized control.

423.2-8 Drafts and Working Papers

Rough drafts and working papers, such as preliminary notes, do not constitute required documentation unless they form an integral part of the finished document or show changes in policy.

423.2-9 ADP Records

With increasing use of automated data processing techniques, adequate documentation of the following types of ADP records is essential: computer programs, machine readable records, functional and operational flow charts, job specifications, records showing basic coding structure, record layouts, printout plans (formats), and basic run instructions (run books).

430 Organization and Maintenance of Files

431 General Organization

Department and post files consist of three main types: central files; authorized decentralized files; and operating, reference, and working files. It is essential to efficient operation that files be physically located with full consideration given to use, security, space, equipment, content of records, and control.

432 Separation of Personal From Official Records

Papers of a personal character which pertain only to an individual's private affairs and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records of the office at all times. When official policy matters are discussed in personal correspondence, that portion pertaining to functions or activities of the

Department or a post is to be extracted and made a part of the official records. Official-informal letters are official records and as such are subject to the same laws, regulations, and legal restrictions governing their maintenance and disposition as those relating to any official documents. (See section 417 for regulations on removal of records.)

445 Disposal of Records

445.1 Legal Provisions

No official Government records may be destroyed without authorization of the National Archives, as set forth in the Records Disposal Act of July 7, 1943, as amended (44 U.S.C. 3301-3314). The law further provides that the head of each Federal agency is responsible for the preparation of disposal lists and schedules as the basis for obtaining such authorization.

445.2 Authority to Dispose of Records

The Foreign Affairs Document and Reference Center has been assigned responsibility for preparing the necessary disposal lists and schedules for submission to the National Archives for approval. Such schedules and lists are based on a careful survey and evaluation of the records concerned with appropriate consultation and clearance with officials having custody and responsibility for the records. Certain categories of records which are common to many agencies have been scheduled by the General Services Administration and published as "General Records Schedules." These authorizations may be applied to Departmental and post records only upon specific instructions from the Foreign Affairs Document and Reference Center. Information material, working papers, and stock copies of processed documents may be destroyed without formal clearance through the National Archives. To the extent possible, such material should not be incorporated in official files.

NOT TO BE PUBLISHED — SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1207 September Term, 1978

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.* — Civil Action No. 77-0220

v.

CYRUS R. VANCE, Individually and as Secretary of State, *et al.*

HENRY A. KISSINGER, Appellant

No. 78-1208

MILITARY AUDIT PROJECT, *et al.* — Civil Action No. 77-0391

v.

DEPARTMENT OF STATE, *et al.*

HENRY A. KISSINGER, Appellant

No. 78-1315

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.* — Civil Action No. 77-0220

Appellants

v.

CYRUS R. VANCE, Individually and as Secretary of State, *et al.*

Appeals and Cross-Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, LUMBARD,* Senior Circuit Judge, and TAMM, Circuit Judge.

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*Of the Second Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

JUDGMENT

These casues came on to be heard on the record of appeals (Nos. 78-1207 and 78-1208) and cross-appeal (No. 78-1315) from the United States District Court for the District of Columbia and were argued by counsel.

For the reasons stated in the attached memorandum, it is ORDERED and ADJUDGED by this court that the judgments of the District Court appealed from in these causes are hereby affirmed.

Per Curiam

For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

Filed: November 7, 1978

78-1207 *et al.*—Reporters Committee v. Vance

MEMORANDUM

The principal issue presented by this Freedom of Information Act appeal is the ownership and appropriate treatment of transcripts of appellant Kissinger's telephone conversations made when he was National Security Advisor to the President and Secretary of State. The Government defendants below, the present Secretary of State and the Librarian of Congress, did not appeal. Thus a judgment affirming the District Court on the ownership issue may make consideration of most of the other issues Mr. Kissinger raises unnecessary. Nevertheless, we find ourselves in full agreement on all issues with the opinion of the District Court filed December 8, 1977, 442 F.Supp. 383 (D.D.C. 1977), and its orders issued pursuant thereto filed January 25, 1978 and March 2, 1978. Copies of the orders are attached.

The District Court's consideration of that portion of the Reporters Committee's request which sought notes of telephone conversations in which Kissinger participated at the White House prior to his appointment as Secretary of State was apparently truncated because that court was under the impression that the plaintiffs had withdrawn their claim to such documents. Before this court the Reporters Committee cross-appealed from Judge Smith's resolution of this question, arguing that it had never withdrawn its claim and that these records should be produced. We disagree. Even if Judge Smith misinterpreted the Reporters Committee's position as to Mr. Kissinger's White House transcripts, the result he reached in denying their production was proper for the following reasons: (1) The Freedom of Information Act does not extend to those of the President's advisors who are so close to him as to be within the White House rather than the Executive Office of the President (*see* 5 U.S.C. §552(e) (1976); S. Conf. Rep. No.

93-1200, 93d Cong., 2d Sess. 15 (1974); *Nixon v. Sampson*, 389 F.Supp. 107, 145-147 (D.D.C. 1975), *entry of order stayed*, 513 F.2d 430 (D.C. Cir. 1975); *cf. Soucie v. David*, 448 F.2d 1067, 1074-1076 (D.C. Cir. 1971)). (2) The mere relocation of these documents to the State Department without any indication that they were used by that agency does not render them State Department records obtainable via an FOIA request to that department. (3) The speculation that some of these earlier transcripts concerned the affairs of the National Security Council adds nothing to plaintiffs' claim because no FOIA request was made of the Security Council and, as mentioned above, the transfer of the notes to the State Department does not change their character.

Affirmed.

Note: The orders referred to above are found at App. 59a and 63a.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	Civil Action No. 77-220
v	)	
CYRUS R. VANCE, et al., Defendants	)	
MILITARY AUDIT PROJECT, et al., Plaintiffs	)	Civil Action No. 77-391
v	)	
DEPARTMENT OF STATE, et al., Defendants	)	

OPINION

In these two Freedom of Information Act cases, the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association, and nine authors and journalists, along with the Military Audit Project, seek access to records, now in the custody of the Library of Congress, of Dr. Henry Kissinger's official telephone conversations during his service as Assistant to the President for National Security Affairs and as Secretary of State. Defendants are the Department of State, Dr. Kissinger, his successor, Cyrus Vance, Librarian of Congress Daniel Boorstin, and Archivist James Rhoads. Motions for Summary Judgment have been filed and argued on behalf of Dr. Kissinger and all plaintiffs.[1]

[1] At argument, the government reported that, while it did not join Dr. Kissinger's motion, it did not oppose it.

Dr. Kissinger served as National Security Adviser from January 20, 1968 until his resignation on November 3, 1975. He assumed office as Secretary of State on September 22, 1973 and remained in that position until the end of the Ford Administration in January, 1977. Thus, for a period of nearly two years, he served in two capacities -- as Secretary of State and as staff adviser to the President.

Throughout Dr. Kissinger's tenure in the Nixon and Ford Administrations, his secretaries, both at the White House and at the State Department, monitored his telephone conversations and took shorthand notes of what was said. Transcriptions of these notes were prepared for Dr. Kissinger and his staff.[2] No distinction was drawn between conversations relating primarily to official government business and those of a more personal nature. All were monitored, transcribed, and the records thereof stored in Dr. Kissinger's office, apart from official agency files.

Prior to leaving office, Dr. Kissinger decided to donate to the United States his personal papers and copies of various official documents relating to his activities while in office. In early 1976 the State Department's Legal Adviser informed Dr. Kissinger that the secretarial notes were not State Department documents but were his own personal papers. This advice was affirmed in writing in a memorandum dated November 11, 1976.

On October 29, 1976, Dr. Kissinger transferred the notes from his State Department office to a vault at the estate of Vice President Nelson Rockefeller in Pocantico Hills, New York. Dr. Kissinger requested Deputy Undersecretary

[2]In the Secretary's own words: "[m]y purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow up on matters discussed orally." SECOND AFFIDAVIT OF HENRY KISSINGER ¶3. In his supporting papers, Dr. Kissinger reports that only his staff reviewed the notes. He never read them, but kept them as a diary.

Lawrence Eagleburger to review all the telephone records, including those compiled during his service at the White House, and to prepare written extracts of "any significant policy decisions or actions not otherwise reflected in the Department's records".[3] These extracts are now filed at the State Department.[4]

Finally, on December 24, 1976, the notes were deeded to the United States, in the custody of the Library of Congress. Under the terms of the deed, public access to the papers was restricted to Dr. Kissinger and his appointees for twenty-five years or until five years after his death, whichever is later. Thereafter the notes would be available for public inspection with the consent or upon the death of the other party to the conversation. On December 28, 1976, the records were delivered from Pocantico Hills to the Librarian of Congress. Subsequently, defendant Rhoads, citing his responsibility as Archivist of the United States to oversee the preservation of "records of a permanent historical value," requested permission to inspect the notes. By letter dated January 18, 1977, Dr. Kissinger rejected that request.

The Freedom of Information Act grants this Court authority to "enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. §552(a)(4)(B). Dr. Kissinger contends that the Act is inapplicable for three reasons. First, he asserts, the fact that the notes are in the custody of the Library of Congress, which is not subject to the Act,[5]

[3]*Compare* AFFIDAVIT OF MONROE LEIGH ¶15 *with* SECOND AFFIDAVIT OF HENRY KISSINGER ¶13.

[4]Plaintiffs are aware of the existence of these extracts but have not sought access to them under the Freedom of Information Act.

[5]*Compare* 5 U.S.C. §552(e) *with* 2 U.S.C. §132. While the Library of Congress receives executive agency treatment for some purposes, *see, e.g.*, 5 U.S.C. §5596, plaintiffs have conceded that it is not subject to requests for information under FOIA. *See* U.S.C. §551(1)(A).

renders meaningless any court order prohibiting the State Department from withholding documents. He argues that FOIA imposes no obligation upon an agency to gather records no longer in its possession[6] and that, in any event, plaintiffs lack standing under the Federal Records Act to challenge the transfer from the Department.[7]

The Federal Records Act provides the exclusive procedure for disposal of government records, which are defined to include:

> "documentary materials . . . made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or *appropriate for preservation as evidence of* the organization, functions, *policies, decisions,* procedures, operations, or other activities *of the Government* or because of the informational value of data in them." 44 U.S.C. §3301 (emphasis added).

Prior disposal of its records, an agency must submit to the Administrator of General Services a list of those intended for disposal. 44 U.S.C. §3302. Only if the Administrator then determines that the records are no longer appropriate for preservation may they be destroyed. 44 U.S.C. §3303a. When, as here, records have been removed from an agency outside this statutory framework, the agency head must so notify the Administrator and, together with him, initiate

[6] *See Nichols v. United States,* 325 F.Supp. 130 (D.Kan.1971), *aff'd,* 460 F.2d 671 (10th Cir.), *cert. denied,* 409 U.S. 966 (1972); *Ciba-Geigy Corporation v. Matthews,* 428 F.Supp. 523 (S.D.N.Y. 1977). *See also, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT* 23-24 (1967).

[7] *See Nichols v. United States,* 460 F.2d 671, 674-75 (10th Cir.), *cert. denied,* 409 U.S. 960 (1972). *See generally, Cort v. Ash,* 422 U.S. 66, 78 (1975).

action through the Attorney General for their recovery. 44 U.S.C. §3106. This, suggests Dr. Kissinger, is plaintiffs' sole remedy.

There is, however, an alternative. Rather than wait for institution of the statutory retrieval action, plaintiffs may first invoke the broad equitable powers granted the district courts in aid of their role as the "enforcement arm" of the Freedom of Information Act. *See Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 19 (1974). *Accord, Nixon v. Sampson,* 389 F. Supp. 107, 121-22 n.34 (D.D.C.), *stayed sub nom. Nixon v. Richey,* 513 F.2d 430 (D.C. Cir. 1975), *dismissed as moot,* (D.D.C. September 21, 1977). The courts may draw on those powers to order the return of wrongfully removed agency documents where a statutory retrieval action appears unlikely.

Secondly, Dr. Kissinger urges that notes of those conversations conducted in his White House capacity cannot be considered "agency records". At oral argument, plaintiffs withdrew their challenge to this position.

Dr. Kissinger's final argument, based on the proposition that creation of the extracts fully satisfied the State Department's record-keeping requirements, is that the notes are personal working papers,[8] not "agency records" and not subject to an FOIA request. He maintains that he considered and treated the notes as personal property from their inception.[9] Circulation was restricted to his immediate

[8] *See* 5 Foreign Affairs Manual [FAM] §432.2-8.

[9] *See* 5 FAM §432, which reads: "Papers of a personal character which pertain only to an individual's private affairs and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records of the office at all times. When official policy matters are discussed in personal correspondence, that portion pertaining to functions or activities of the Department or a post is to be extracted and made a part of the official records." By its terms, the regulation applies exclusively to

staff. The records were stored in filing cabinets in his office.[10] Dr. Kissinger asserts that had he thought that the notes would be determined to be official records, he would have edited them for errors in transcription. Since that would have been a long and arduous process, he would have abandoned the entire project.

State Department regulations require documentation of all official activities in order to "facilitate the making of decisions and policies and the taking of actions" by Department employees and "to provide materials for research and historical purposes." 5 Foreign Affairs Manual [FAM] §423.1. *See* 41 C.F.R. §101-11.202-2(a). This requirement extends to all "decisions, commitments, and discussions of any significance which are oral in nature." 5 FAM §423.2-1. *See* 41 C.F.R. §101-11.202-2(b). Involved here are high-level conversations of the Secretary of State. The significance of the commitments, decisions, and discussions embodied in these conversations is apparent from the stature of the other parties to them (two presidents, heads of state, cabinet officers, diplomats, legislators, scholars, journalists, and others) and is underscored by a Department policy which prohibits monitoring of telephone conversations except when "absolutely essential to the conduct of business."[11] Consequently, under his own regulations, Dr. Kissinger had no alternative but to document the matters discussed in the conversations.

It is a basic rule of copyright law that work created by an employee within the scope of employment is the property of the employer. *See, e.g., Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936

"[p]apers . . . which pertain only to an individual's private affairs" and to "personal correspondence."

[10] *Id.*

[11] The policy is set forth in an undated letter from the Department's Acting Assistant Secretary for Congressional Relations to former Congresswoman Bella Abzug. *But see* 41 C.F.R. §101-35.308-9(f).

(1970); *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966). This principle applies equally in the government sphere.

In *First Trust Company of St. Paul v. Minnesota Historical Society*, a federal trial court rejected a government claim to journals compiled by Lieutenant William Clark during his exploration of the Missouri River with Captain Meriwether Lewis. 146 F.Supp. 652 (D.Minn. 1956). The court noted that Captain Lewis, not Lieutenant Clark, had been charged by President Jefferson with the responsibility of creating a log of the expedition. On appeal, the Eighth Circuit framed the issue as follows:

> "If Clark's notes are the written records of a government officer *executed in the discharge of his official duties*, they are public documents and ownership is in the United States." *United States v. First Trust Company of St. Paul*, 251 F.2d 686, 690 (1958) (emphasis added).

On the basis that the diary contained "a great many personal and private notations or letters, details of personal illnesses, social engagements, and other such items as might not be expected to be found in notes of official character or in an official record," the Court concluded that the notes could not be classified as government property. *Id.*

Similarly, in *Public Affairs Associates, Inc. v. Rickover*, this Court held that Admiral Hyman Rickover, not the federal government, was the owner of two speeches authored and delivered by the Admiral. 268 F.Supp. 444 (D.D.C. 1967). Determinative factors in that case were that the speeches had been prepared by Admiral Rickover while not on duty and during his leisure time at home. Both speeches contained his personal views on subjects unrelated to his official responsibilities and were delivered at private functions before private audiences.

Although personal in some respects, Dr. Kissinger's secretarial notes were compiled under circumstances unlike those surrounding the creation of either Lieutenant Clark's journals or Admiral Rickover's speeches. The records in dispute here were produced not only in accordance with Department regulations but also on government time and with the aid of department employees, equipment, materials, and other public resources. Having been prepared and transcribed "in the discharge of his official duties", the notes are property of the United States.[12] The Court further finds that the records were wrongfully removed and should be returned to the State Department.

Plaintiffs' Motions for Summary Judgment will be granted, and defendant Kissinger's Motion for Summary Judgment will be denied. Counsel will submit an appropriate order within ten days.

/s/ John Lewis Smith, Jr.
United States District Judge

December 8, 1977

[12]Dr. Kissinger suggests that the creation of the extracts transformed the original notes from federal records into personal property. Department regulations do not envision such a metamorphosis. Section 432 of the regulations requires extraction of official matter contained in "personal correspondence." *See* note 9, *supra*. It does not permit agency employees to extract personal matter from official correspondence and to then treat the correspondence as personal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.,	)	
Plaintiffs	)	
v.	)	Civil Action No. 77-0220
CYRUS R. VANCE, et al.,	)	
Defendants	)	
MILITARY AUDIT PROJECT, et al.,	)	
Plaintiffs	)	
v.	)	Civil Action No. 77-0391
DEPARTMENT OF STATE, et al.,	)	
Defendants	)	

ORDER

This cause came on to be heard on motions of the plaintiffs in Nos. 77-0220 and 77-0391 for summary judgment and on cross-motion of defendant Henry A. Kissinger for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, affidavits and admissions on file, and having stated its findings of fact and conclusions of law in its Opinion filed on December 8, 1977, it is hereby

ORDERED THAT

1. Defendant Kissinger's cross-motion for summary judgment is denied to the extent that it relates to transcribed secretarial notes which reflect telephone

conversations made in his capacity as Secretary of State, and granted to the extent that it relates to transcribed secretarial notes which reflect telephone conversations made in his capacity as Assistant to the President for National Security Affairs.

2. The motion of plaintiffs in No. 77-0220 for summary judgment is granted to the extent that it relates to transcribed secretarial notes which reflect telephone conversations made by defendant Kissinger in his capacity as Secretary of State, and denied to the extent that it relates to transcribed secretarial notes which reflect telephone conversations made by defendant Kissinger in his capacity as Assistant to the President for National Security Affairs.

3. The motion of plaintiffs in No. 77-0391 is granted to the extent that it relates to transcribed secretarial notes which reflect official telephone conver-secretarial notes which reflect telephone conversations made by defendant Kissinger in his capacity as Secretary of State, and denied to the extent that it relates to any documents other than such transcribed secretarial notes. [sic]

4. As soon as practical after the effective date of this order, defendants Kissinger, Daniel J. Boorstin, Cyrus R. Vance, and the Department of State, or their agents and employees, shall cause the original transcribed secretarial notes, or portions thereof, which reflect conversations made by defendant Kissinger in his capacity as Secretary of State to be transferred to the custody of the Department of State.

5. Upon receipt of the notes transferred pursuant to paragraph 4 above, the Department of State shall determine which of the notes, or portions thereof, are required to be released to plaintiffs pursuant to the Freedom of Information Act, 5 U.S.C. §522.

6. After making the determination required by paragraph 5 above, the Department of State shall make available to defendant Kissinger that portion of the notes

deemed subject to disclosure in order to afford him a reasonable opportunity to apply to this Court for an order restraining disclosure of any such notes which defendant Kissinger believes are exempted from disclosure under 5 U.S.C. §552(b)(6). A similar opportunity shall be afforded to any person who was a party to a conversation which is proposed to be disclosed, provided (a) such person gives the Department of State written notice of his desire to examine such conversation prior to its disclosure; and (b) such notice is received before the disclosure takes place.

7. Upon completion of the procedures set forth in paragraph 6 above, the Department of State shall make available to plaintiffs all notes which are required to be disclosed pursuant to the Freedom of Information Act, subject to any order of this Court entered in response to any application to restrain disclosure made by defendant Kissinger or other persons entitled thereto.

8. The court will retain jurisdiction of this cause for the purpose of adjudicating any disputes which may arise respecting claims of exemption made by defendant Kissinger or other persons identified in paragraph 6 above or by the Department of State.

9. The effectiveness of this judgment and order is suspended for a period of 10 days following the entry thereof to permit any defendant desiring to do so to move for a stay pending appeal, and shall be further suspended pending determination of any such motion or motions.

DATED: *January 25, 1978*

/s/ John Lewis Smith, Jr.
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	
v	)	Civil Action No. 77-220
CYRUS R. VANCE, et al., Defendants	)	
MILITARY AUDIT PROJECT, et al., Plaintiffs	)	
v.	)	Civil Action No. 77-391
DEPARTMENT OF STATE, et al., Defendants	)	

ORDER

Upon consideration of defendant Kissinger's motion for stay, the arguments offered in support thereof and the arguments offered in opposition thereto; it is hereby

ORDERED that paragraphs 7 and 8 of the final Order entered herein on January 25, 1978, is hereby stayed and suspended pending a final determination of the merits on appeal; and it is

FURTHER ORDERED that the procedures contemplated by paragraph 6 of such Order do not require any person referred to in such paragraph to make application to the Court for any order restraining disclosure of materials proposed to be disclosed by the Department of State sooner than 60 days following the final determination of all appeals pending herein; and it is

FURTHER ORDERED that, during the pendency of any appeal in this case, the Department of State shall hold the

notes transferred to it pursuant to paragraph 5 of the Court's Order of January 25, 1978, solely for the purposes specified in paragraphs 5 and 6 thereof; that access to such notes shall be limited to State Department records officers specifically designated by it to make the determinations called for by such paragraph 5, to their superiors within the Department with whom consultation is necessary for such purpose and to the Department of Justice attorneys having specific responsibility for the conduct of this litigation; that the Department of State shall maintain a list of all persons having access to the notes and shall make such list available to defendant Kissinger; that, except as provided herein, no person having access to the notes shall reveal the contents thereof to any other person; and that such person shall, before obtaining access to the notes, be furnished with a copy of this Order; and it is

FURTHER ORDERED that the defendant Kissinger shall have access to the notes to the extent permitted by established State Department regulations and policies.

/s/ John Lewis Smith, Jr.
UNITED STATES DISTRICT JUDGE

Dated: March 2, 1978.

DEPARTMENT OF STATE
LEGAL ADVISER
WASHINGTON

November 11, 1976

Limited Official Use

MEMORANDUM TO THE SECRETARY

Legal Status of Transcribed Notes of Your Telephone Conversations

In light of today's story in the *Washington Post* (copy attached), I thought it would be useful if I summarized the advice and opinions I have given over the last eleven months on the question of whether the transcribed secretarial notes of your telephone conversations should be considered as the records of any government agency, or as essentially personal papers that you are entitled to retain when you leave office.

The question first arose last January, when a request was filed under the Freedom of Information Act for some of these papers. At that time, I expressed my opinion that these papers were not "agency records" within the meaning of the Freedom of Information Act. Instead, they had consistently been treated as personal in nature, and there were rights of privacy at issue if telephone conversations between two people had to be disclosed to third parties or to the public. For these reasons, I was of the opinion that these papers were personal rather than agency records.

In February, I raised the Freedom of Information Act questions with the Assistant Attorney General for the

Decontrolled under
5 FAM 900 et seq.
12/22/76 *MS*

Office of Legal Counsel at the Department of Justice. He concurred in my view that the pending Freedom of Information Act requests for the transcribed notes of your telephone conversations could properly be denied on the basis that they were not agency records.

Finally in March, I was called upon to review an appeal of the Department's denial of the initial Freedom of Information Act request for these papers. I advised the Department's Council on Classification Policy that there was "very strong support" for concluding that these papers are not agency records. Incidentally, I gave this advice despite an assumption that some of the transcriptions contained classified material. The Council on Classification Policy reviewed the requested papers and found that they did *not* contain classified information.

Independently of these formal occasions when my legal opinion was sought by bureaus of the Department, I have on several occasions discussed with you my view that you would be entitled to retain the transcribed notes of your telephone conversations when you leave office. The detailed basis for my opinion is the following:

1. The papers have been expressly designated and filed as personal from the time they were originated. Under Department of State regulations (5 FAM 417.1a), a retiring official may retain papers expressly designated or filed as personal from their time of origin or receipt.

2. The papers have not been circulated within any agency, but have been continuously held in your possession and in that of your immediate assistants. They were retained solely at your discretion as work aids to help you recall prior conversations and events. Recent authority support the view that such papers are personal rather than agency records. In *Porter County Chapter* v. *A.E.C.*, 380 F. Supp. 630 (N.D. Ind. 1974), certain handwritten notes and materials of A.E.C. staff members were sought under the Freedom of

Information Act. The Court concluded that since "such materials [were] not circulated to nor used by anyone other than the authors, and [were] discarded or retained at the author's sole discretion for their own individual purposes in their own files," the materials were "personal notes and not agency records." *Id.* at 633. The OMB guidelines on the Privacy Act are in accord. They state that the Privacy Act extends only to records under the control of an agency and not to "uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion" — even if such materials are "in the possession of agency employees and used by them in performing official functions." 40 F.R. 28952 (1975).

3. The transcriptions that I reviewed in connection with the Freedom of Information Act requests did not contain any government decisions or policy actions. In the event that other transcriptions should reflect such decisions or actions, it is highly probable that they would have been incorporated in other papers at the time the decisions were implemented — and those latter papers would certainly have become government records. Nevertheless, as a precaution, you should review the papers. If any discussion of a significant government activity or decision is found, an extract or summary of it should be prepared and submitted to the appropriate records officials. This procedure is contemplated in the Department's regulations (5 FAM 432). Although technically these regulations apply only to "personal correspondence" and not to transcribed secretarial notes, the preparation of a summary or extract will assure that government records are complete.

4. There are expectations of privacy when two people have a telephone conversation. Although either party could well make a record of a conversation, one assumes that what was said will be revealed to others only at the discretion of the other party. Treating what was said as a

government or public record would violate these expectations.

5. The fact that the papers were retained for personal use, that they were not required to be prepared, that they have been consistently treated as personal, and that they contain personal and private matter, support the view that they are personal in nature. Similar factors were relied on in *United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), on reaching a conclusion that private notes made on an official government expedition (the Lewis and Clark expedition) were personal papers and not government property of the United States.

6. The fact that these transcriptions were prepared by government-paid secretaries using government paper and typewriters is not, in my opinion, controlling, in view of the factors discussed in paragraphs 1 through 5 above. Moreover, it is accepted practice that senior officials who must devote extraordinary amounts of time to government duties may make use of government office resources to prepare private correspondence and other personal materials.

7. Whether future judicial decisions concerning the Nixon papers might have some effect on the notes of your telephone conversations cannot yet be determined. But I am of the view that the Presidential Recordings and Materials Preservation Act of 1974 does *not* apply to these transcribed notes because that statute on its fact applies to "the Presidential historical materials of Richard M. Nixon" and not to personal papers of individuals who served under him.

Today's article in the *Washington Post* suggests that a "U.S. court restraining order" in the Nixon papers litigation may apply to the transcribed notes of your telephone conversations. That court order, however, expressly applies only to "defendants" in that litigation and

"their superiors, agents and assigns." *Nixon* v. *Administrator of General Services*, 408 F. Supp. 321, 375 (D.D.C. 1976). Since you do not come within any of these categories, this court order does not apply to the transcribed notes of your telephone conversations.

In summary, it is my opinion that under Department of State regulations and other legal criteria, these particular papers are personal and may be retained by you when you leave office.

Monroe Leigh

Kissinger Hints He's Ready for Talks on His Future

By Don Oberdorfer
Washington Post Staff Writer

One of the world's hot literary properties — Henry A. Kissinger — passed the word yesterday that he plans to meet with "a few people" in the coming weeks about his work after leaving public office.

This announcement, from spokesman Robert L. Funseth, superseded an earlier statement from the Secretary of State that he would consider it "improper" to discuss financial offers while still in government.

Nobody would identify the persons who Kissinger plans to meet about his future. However, friends said Kissinger expects to write a book within the next two or three years, and is exploring a quasi-independent role as an adviser and consultant, possibly combined with an academic appointment.

Kissinger may well go onto corporate boards of directors, according to one friend, but will definitely not take a government post. Those familiar with his thinking said there is

little chance he will accept reported offers to be a television commentator, considering such a post to be beneath the dignity of a former diplomatic wizard.

Former Under Secretary of State Carlyle E. Maw, who was Kissinger's personal lawyer before joining the government, said yesterday he has been accepting "offers, suggestions and proposals" on behalf of Kissinger in recent weeks, but that Kissinger has not yet given them his attention.

Maw confirmed that he received a number of proposals for a book, which is expected to be one of Kissinger's major activities — and a major source of income — in the next several years. However, the lawyer said he had seen no outline and that he does not believe Kissinger has started drafting. Maw, who returned to private law practice last September, denied a published report that Kissinger has named a literary agent.

A New York literary source said the Kissinger memoirs were considered to have potential as "a very big book of our time," though nobody knows what Kissinger would cover in his writings, or how frank or incisive he would be. This source said publishing houses have submitted offers over many months, with no response from agents of Kissinger except to receive the offers.

European publishers are said to be particularly enthusiastic about a Kissinger memoir. A rumor, subsequently denied, swept European literary circles last week that the book was to be put up for auction in London within a few days.

Because of Kissinger's extraordinary importance in the history of the present era and his highly personalized and secretive methods of operation, his files and recollections may be of great importance to his successors in government as well as extremely valuable to historians and the public.

Lawrence S. Eagleburger, Kissinger's executive secretary, said yesterday that the originals of Kissinger's government papers will rest in the files of the State Department or, in the case of papers generated during his tenure as presidential national security affairs assistant, in the White House. As with other retired secretaries of state, access to his State Department documents after his departure from government will be arranged, Eagleburger said.

Eagleburger said extensive "memoranda of conversations" covering talks between Kissinger and foreign and U.S. leaders are part of this official file.

However, he said Kissinger obtained a State Department legal adviser's ruling last January that secretarial notes of his telephone conversations are "personal papers" which may be taken with him when he leaves government.

Some of Kissinger's most important transactions with presidents and foreign leaders are believed to have taken place by telephone. Some private attorneys believe the records of telephone conversations monitored during the Nixon presidency may be covered by the U.S. court restraining order which requires public preservation of the Nixon papers.

According to State Department regulations, no papers which have not been explicitly designated or filed as personal at the time of origin or receipt may be removed when an official resigns.

The line between official records and personal papers is the subject of a memo, awaiting final clearance, which the National Archives and Records Service plans to send within a few days to all government departments.

Rep. Bella Abzug (D—N.Y.) chairman of the subcommittee on government information of the House Government Operations Committee, is reported to be considering

an appeal to have a moratorium on the removal of any papers by departing Ford administration officials until the ownership questions can be resolved and the removal of documents supervised by the National Archives and the subcommittee.

Eagleburger said yesterday he expects Kissinger to be "very conservative" in determining what might be of a personal nature. "If there is a question about it, it will stay here," Eagleburger said.

In all of his dealings with senior Chinese officials in Peking and some of his dealings with Soviet diplomats, Kissinger has departed from the traditional practice of utilizing his own interpreter, relying instead exclusively on interpreters supplied by the other sides. There have been reports that this was done by Kissinger for purposes of keeping dealings secret from the U.S. government bureaucracy and that no other U.S. official could be sure of what was said in some extremely important meetings.

Eagleburger quoted Kissinger yesterday as saying there was always a U.S. note-taker during his Chinese and Soviet conversations. Eagleburger said the use of Chinese rather than American interpreters in Peking was at Chinese insistence.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption omitted in printing)

SECOND AFFIDAVIT OF HENRY A. KISSINGER

HENRY A. KISSINGER, being duly sworn, deposes and says:

1. I am one of the defendants in the above-captioned actions. This affidavit is given in support of my Cross-Motion for Summary Judgment filed herein, and states facts within my own knowledge.

2. From January 20, 1969, until September 22, 1973, I served in the White House as Assistant to the President for National Security Affairs. From September 22, 1973, until November 3, 1975, I served both as Assistant to the President for National Security Affairs and as Secretary of State. After November 3, 1973, I continued to serve as Secretary of State until January 20, 1977.

3. During the period of my government service, my secretaries generally monitored my telephone conversations and took shorthand notes of what was said. These notes were later transcribed and filed in my personal files; the shorthand notes were not kept. My purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow up on matters discussed orally. There was nothing unusual about this; many other high-level officials at the White House, the State Department, and other departments of the government have for decades followed the same practice of transcribing telephone conversations and filing them with their private papers.

4. In my case, the notes served as work aids to ease the administrative burdens of my office. For example, my executive secretary checked them periodically in order to prepare my appointments schedule and keep it current. The notes were also read by my Senior Special Assistant so that he could keep abreast of my activities. This saved time, as it enabled him to know whether any matters I had discussed required follow-up or implementation without waiting for me to report the substance of my telephone conversations. The notes had no other function, and were used for no other purposes.

5. The monitoring of my conversations was not limited to discussions of official business, but included most of my conversations without regard to their subject matter or the identity of the other party to the conversation. It was not practical to limit the monitoring to official conversations, because I would not always know the character of a conversation until after it had begun. Thus, the transcribed notes give details of my conversations with friends, journalists, diplomats, government officials, two Presidents, scholars, Congressmen, and other people. Many of these conversations were of a purely personal character; this is true of conversations with diplomats, Congressmen and other government officials as well as conversations with others. Other conversations were of a mixed character, in which discussions of personal and official matters were intermingled. Even formal business conversations would concontain humorous and other personal and non-official remarks.

6. I always regarded the telephone transcripts as work aids which I could retain or discard as I chose as had several of my predecessors and many other officials. They were not filed among the official records of any agency, but were stored along with the rest of my personal papers in personal files located in my office. The notes were not to my

knowledge circulated outside my office, and only I and my immediate personal staff had access to them. I did not edit the notes as they were made, or at any other time. There was no need to do so, because no one other than my immediate staff used them and they could obtain the limited information they needed from the rough notes themselves. Had I believed the telephone transcripts would be treated as official records, I would have been obliged to edit them as they were made in order to assure that the stenographers had understood correctly and that the notes were accurate and complete and in suitable form for filing as official records. Since this would have required a substantial commitment of my time, I probably would have decided the notes were not worth the effort, and thus would not have made them at all.

7. As the end of my term as Secretary of State drew near, I began to make plans for leaving public office. I believed that the papers relating to my years in government should be preserved, and decided to donate them to the United States. I chose the Library of Congress as the custodian of these papers, because I knew it had been used as a depository by many other Secretaries of State.

8. In making this donation, I wanted to include not only my personal papers, but also copies of official State Department records relating to my activities. I believed that such a collection of personal and official papers would provide a unique opportunity for future historians by assembling in one place all the papers relating to my years of association with government.

9. To accomplish this objective, it was necessary to obtain State Department approval to transfer my working files, which contained copies of official documents connected with my activities, to the Library. This approval was required because the State Department's policies do not permit a retiring official to retain copies of classified

documents unless it is satisfied that the documents will be stored in facilities suitable for the receipt of such materials. To satisfy this requirement, it was necessary to secure approval by the Department's Office of Security for the proposed storage facilities at the Library and to establish procedures for review of the working files to assure that they did not contain any original records which should have been filed in the Department's Central Files. The steps taken in meeting these requirements are described in a Donation Procedures Memorandum, dated November 12, 1976, a copy of which is attached hereto.

10. The procedures adopted in connection with transfer of my working files to the Library of Congress did not apply to my personal files, because Department of State regulations presume that papers which were designated and filed as personal from the date of origin or receipt may be removed by a retiring official without further processing. The telephone notes at issue here met this description, because they had originally been part of my personal files transferred from the White House to the State Department and had continued to be maintained in separate personal files during my years at the Department.

11. In addition, I had been advised by the Department's Legal Adviser, Monroe Leigh, that the telephone notes were not records of the State Department, but rather were my personal papers which I would be free to retain when I left office. He first gave me this advice in early 1976, and repeated it in a number of subsequent discussions. Mr. Leigh summarized the substance of that advice in a written memorandum, dated November 11, 1976, a copy of which is attached as Exhibit B to the complaint filed in No. 77-0220 herein.

12. In October 1976, I decided to remove the telephone notes from my office in the State Department. Since I had no suitable place of my own in which to store the notes, I

received permission from then Vice President Rockefeller to place them in a large bank-type vault at his estate in Pocantico Hills, New York. The removal and transfer occurred on October 29, 1976; it was arranged for me by Lawrence M. Eagleburger, at my request.

13. At about the same time, I asked Mr. Eagleburger to review the notes to determine whether extracts should be made of any portion of the notes for inclusion among the Department's official records. I chose Mr. Eagleburger because he had worked with me during most of the time I had been in government, was familiar with my activities, and therefore could identify the portions of the notes appropriate for extracting. My instructions to Mr. Eagleburger were that he should read all the telephone notes, including those from the White House period, and extract everything he believed was necessary in order to comply with the regulations and Mr. Leigh's advice. He subsequently reported to me that the extracts had been made and delivered to the Director of the Department of State Records Center and to the Staff Secretary of the National Security Council.

14. The agreement donating my State Department working files and personal papers from my years at Harvard University to the Library of Congress was executed on or about November 12, 1976. A copy of that agreement is attached as Exhibit A to the complaint filed in No. 77-0220 herein. In mid-December 1976, I decided that the telephone notes should also be part of the Library's collection. I executed a separate agreement relating to this donation on December 24, 1976. A copy of this agreement is attached as Exhibit C to the complaint filed in No. 77-0220 herein.

15. The notes were treated separately in a second agreement because I concluded that the access restrictions stated in the original agreement were not adequate to deal

with the special privacy problems presented by the notes. Many of the notes contained statements made in confidence which the speakers could reasonably assume would not be made public. Some of these statements might affect the reputations of prominent individuals still active in politics or foreign affairs. I believed there was a need to preserve the confidentiality of these conversations until sufficient time had passed to assure that they would be a part of history rather than of contemporary politics. Since it was necessary to protect not only my privacy, but the privacy of the persons with whom I spoke, I decided the second agreement should restrict access to these notes for the lives of *both* parties to the conversations.

16. At about the time the second agreement was signed, I asked Mr. Eagleburger to arrange for transfer of the notes from Pocantico Hills to the Library of Congress. I understand that this transfer was made on December 28, 1976.

17. Since this litigation began, I have had an opportunity to examine the notes. This limited inspection confirms my previous understanding that the notes are rough memoranda which vary considerably in quality according to the skill of the secretary who made them. Although some of the notes appear to be substantially verbatim, many others are only rough approximations of what was said. Quite a few of the notes I saw contained misspelled names, omissions, garbled passages, and outright errors of transcription. Although the notes are useful in refreshing my recollections of particular conversations in which I participated, I do not believe they could be regarded as accurate records of my conversations unless they were first corrected and placed in proper form for filing as records.

18. Future historians, who will have the opportunity of comparing the notes to official records after these records have been declassified, may find the notes useful. However,

I believe it would be highly inappropriate to release them now, when the full historical record of the period is still incomplete, and when many of the participants in the conversations are still active in public life.

HENRY A. KISSINGER

(Jurat omitted in printing)

DEPARTMENT OF STATE

ACTION MEMORANDUM
S/S

November 12, 1976

LIMITED OFFICIAL USE

TO : The Secretary
FROM: M — Lawrence S. Eagleburger

Donation Procedures

Attached (Tab 1) is a proposed Deed of Gift and Agreement, which would be the legal instrument by which the collection of papers from your years in Government and from other periods of your life would be donated to the Library of Congress.

Paragraphs 2 and 3 of the proposed Deed of Gift and Agreement refer to Government review and approval of copies of Government papers that would be included in the collection. If you concur, papers will be reviewed in the Department of State in the following manner:

1. The Director of the Department of State Documents Center (FADRC) will designate up to three FADRC employees to review your Department of State files, which may include some personal papers which were not expressly designated or filed as personal from their time of origin or receipt. This is in accordance with Department regulations (5 FAM 417.1).

2. In reviewing these papers, the FADRC employees will crosscheck all Department documents in your files against the Central Foreign Policy File of the Department and those files retained in the Executive Secretariat, to ensure

that the central file is complete and that the Secretary's files do not include any original or record copies. If a Department record is found in your file that is not present in the central file, the FADRC employees will (a) make a duplicate of the paper, (b) place the duplicate in your files, and (c) take the necessary steps to include the document in the Department's record system. In some cases, certain documents may be temporarily retained in the Executive Secretariat rather than the Department's Central Foreign Policy File.

3. If the FADRC employees locate any paper which they consider to be personal or of a non-record nature, they will simply leave that paper in the file and take no action to include such items in the Department's central records. In the case of any document containing both personal and official matter, an extract of official contents will be prepared for inclusion in the Department's record system. In making determinations between personal, record, and non-record material, FADRC employees will be guided by the Director of FADRC, who will, as need arises, consult with one of your assistants and/or the Department's Legal Adviser in making a final decision. If you so desire, all documents or portions of documents duplicated for the central files can be so annotated on your copy.

4. After the Department's Document Center has completed its review of a file or group of files, it may be delivered to the Libarary of Congress under paragraph 3 of the Deed of Gift and Agreement at Tab 1.

5. Under the Department's regulations (5 FAM 417.1a), you are entitled to retain papers that have been expressly designated or filed as personal from their time of origin or receipt. In accordance with paragraph 3 of the Deed of Gift and Agreement, these personal papers may be transferred to the Library of Congress at any time within three months after the Deed of Gift and Agreement is signed.

6. The Department of State's Office of Security has completed an inspection of the storage facilities at the Library of Congress to be used for the storage of your collection of papers. It has been determined that they satisfy the requirements for storage of all classified or controlled information, provided the Library of Congress takes certain steps with respect to the storage area (see Tab 3). The Library of Congress has undertaken to complete these steps within the coming week. No copies of Government papers will be delivered to the Library until these steps are completed.

7. At the time you resign your position as Secretary of State and leave the Department, you will be required (under 5 FAM 417.2) to sign a Separation Statement, Form JF-3. A copy of the Statement you will be required to sign appears at Tab 2.

As noted below, the procedures discussed in this memorandum, as well as the provisions in the Deed of Gift and Agreement pertaining to the Department of State, have been approved by the Department officers concerned. If you concur, the procedures discussed in this memorandum will be implemented.

Recommendation:

That you concur in the procedures described in this memorandum.

Approve __ Disapprove_____

Attachments:

1. Proposed Deed of Gift and Agreement.

2. Copy of Separation Statement, Form JF-3.

3. Memorandum from the Office of Security concerning the storage area at the Library of Congress.

4. Excerpt of Department of State Regulations.

Clearances:

L — Monroe Leigh

A — John Thomas

A/O/FADRC — Jack Pruden

(Attachments omitted in printing)

DEPARTMENT OF STATE
Washington, D.C. 20020

October 7, 1976

Dear Mrs. Abzug:

Our study has now been completed and the Secretary has asked me to reply to the questions contained in your letter of July 14 on the telephone monitoring practices of the Department of State. Basically, the Department is subject to the Federal Property Management Regulations (FPMR 101-35.308). Your specific questions are answered as follows:

1. Q: Does the agency presently permit monitoring of incoming or outgoing telephone calls? (for the purpose of this inquiry, "Monitoring" includes, but is not limited to, a secretary or any third person listening in on the line, either covertly or overtly.)

A: The Department *prohibits* the monitoring of telephone calls except for the most limited purposes.

1a). Q: For what purpose and under what circumstances does monitoring occur?

A: The only exception to the general prohibition is to permit a third party to listen to the telephone conversations of the senior principal officers of the Department for the purpose of taking notes or making

The Honorable
Bella S. Abzug, Chairwoman,
Government Information and
Individual Rights Subcommittee
House of Representatives

appointments and to improve the general efficiency of operations. This is done only at the express request of the officer — whose calls are those being monitored.

1b.) Q: Do agency employees consent to monitoring of their telephone conversations and, if so, are their consents given in writing?

A: Again, employees' telephone conversations are not monitored; this is prohibited by the Department. In accordance with the provisions of FPMR 101-35.308, monitoring is permitted only when an exception to the general prohibition is deemed absolutely essential to the conduct of business. Only principals have been permitted to have a monitoring device; in such cases the exception has been granted at his own request to monitor his own telephone conversations.

1c.) Q: To what extent are the employees and outside callers aware of the presence of another party on the line?

A: As noted above, monitoring occurs only in the most limited circumstances. In some of these cases, the other party may not be aware that the call was being monitored.

2. Q: Is tape recording of telephone conversations on the agency's lines presently permitted? If so, do any warning or consent requirements accompany or limit this practice?

A: Only in its Operations Center does the Department have equipment for taping telephone conversations. Activation of this equipment is permitted in only two cases: 1) when an incoming caller requests that his conversation be recorded for later transmission to a third party; 2) in the event of a threatening call such as a bomb threat or warning of terrorist attack. The equipment operates without any "beep" or warning device, since it is used only when the calling party has voluntarily requested its use or in instances when criminal activity is suspected.

3. Q: Does the agency take any measures to minimize its listening time to portions of conversations which are relevant to the purposes of the monitor?

A: Monitoring is authorized only when the principal determines that monitoring by the third party is relevant or necessary to the transaction of business.

4. Q: Are there any regulations controlling the agency's telephone monitoring practices? If so, please include a copy with your reply. Is the agency affected by any general regulations issued by the General Services Administration, the Office of Telecommunications Policy, or the Federal Communications Commission? If so, please cite the regulations.

A: As noted above, the Department is subject to the provisions of the Federal Property Management Regulations (FPMR 101-35.308.)

5. Q: Under what statutory authority does the agency monitor the telephone conversations of its employees and outside callers?

A: Once again, the Department does not monitor the telephone conversations of its employees. The limited monitoring of outside calls described in 2 above, of course, is not done pursuant to specific statutory authority but under the general authority of the Department to conduct its business.

6. Q: Does the agency employ any automatic devices which record dialing impulses or observe service quality? Does use of this equipment fall within the agency's definition of telephone monitoring?

A: The Department of State does not have any equipment which records dialing impulses or observes service quality.

7. Q: What does the agency do with information regarding illegal activity which comes into its hands in the course of telephone monitoring for service or supervisory purposes?

A: The Department of State does not monitor telephone calls for service quality or supervisory purposes.

8. Q: Do the agency's practices ever conflict with State or Federal law? Where and when has this occurred? In the event of a conflict between State and Federal law, which law controls the agency?

A: We are not aware of any instance in which the Department's practices have been in conflict with state or federal law.

9. Q: Does AT&T service the agency's monitoring equipment? Does any AT&T policy constrain the agency's monitoring practices? Do you have

any reason to believe that AT&T has ever participated in any independent or outside monitoring of the agency's lines?

A: The small amount of telephone monitoring equipment at the Department is the property of the C&P Telephone Company and was installed and is maintained by their service representatives. The Department of State has agreed in writing to abide by the regulations of the C&P Telephone Company regarding the operation of these devices. These regulations are based upon applicable FCC regulation. The Department is not aware of any monitoring of the agency's lines by AT&T.

10. Q: Does the agency receive requests to monitor pursuant to court order or for national security purposes? How often has this occurred in the past 10 years, and to what extent does the agency comply with these requests?

A: We are not aware of any instance in which the Department has received a request to monitor calls pursuant to court order or for national security purposes.

I hope that these answers are responsive to your questions.

Sincerely yours,

Kempton B. Jenkins
Acting Assistant Secretary
for Congressional Relations

Supreme Court, U. S.
FILED
JUL 2 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
October Term, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER,
Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Respondents.

and

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Petitioners,

v.

HENRY A. KISSINGER,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitions For Certiorari filed January 8, 1979 and February 5, 1979

Certiorari granted April 16, 1979

IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

and

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Petitioners,

v.

HENRY A. KISSINGER,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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LIST OF RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 77-0220

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs

v.

CYRUS R. VANCE, et al., Defendants

Date	Nr.	Proceedings
1977		
Feb. 08		COMPLAINT; exhibits A, B, C, D, E, F, G; appearance.
Mar 21		AMENDED complaint by pltf; Exhibits A thru I; c/m 3-21-77.
Apr 19		ANSWER of defts Vance and Boorstin to amended complaint; c/m 4-19-77; Appearance of Jeffrey Axelrad.
Apr 19		ANSWER of deft Henry A. Kissinger to amended complaint; c/m 4-19-77. Appearances of James E. Wesner and Martha Jane Shay.
Apr 19		CALENDARED. CD/N.
Apr 19		MOTION of pltfs for summary judgment and, alternatively, a preliminary injunction; statement of material facts; P&A's; table of contents; affidavit of William E. Leuchtenburg; affidavit of Nat Hentoff; affidavit of William Safire; Exhibit A; affidavit of Donald G. Herz-

berg; appendices to memorandum of points and authorities; c/m 4-18-77. (fiat) Smith, J.

May 02 OPPOSITION of deft Kissinger to pltfs motion for a preliminary injunction; P&A's; table of contents; table of authorities; c/m 5-2-77.

May 02 OPPOSITION of defts Vance and Boorstin to pltfs motion for a preliminary injunction; affidavit of John C. Broderick; memorandum; attachment; c/m 5-2-77.

May 10 REPLY MEMORANDUM of points and authorities of pltfs in support of their motion for a preliminary injunction; table of contents; c/s 5/10/77.

May 11 SUPPLEMENT by deft #3 to opposition to plfts motion for preliminary injunction; Affidavit of Henry A. Kissinger;c/s 5-11-77.

May 12 SUPPLEMENT by defts #2 and #3 to opposition to pltfs motion for preliminary injunction; Affidavit (2nd) of John C. Broderick; Attachments A, B, C; c/s 05/12/77.

May 13 MOTION of pltf for a preliminary injunction argued and taken under advisement. (Rep: D. Copeland) Smith, J.

May 20 OPINION and Order denying pltfs motion for preliminary injunction. (N). (See Opinion for further details) Smith, J.

May 26 MOTION of defts to consolidate with 77-0391; c/s and c/m 5-25-77.

June 17 OPPOSITION by defts Vance, Boorstin & the Department of State to motions of pltfs. for summary judgment; affidavit of Jeffrey Axelrad; memorandum; c/m 6-17-77.

June 17 REQUEST by defts Vance, Boorstin & the Department of State for production of documents directed to deft Kissinger; c/m 6-17-77.

June 17 MOTION by defts Vance, Boorstin & the Department of State for a protective order; memorandum; c/m 6-17-77.

June 17 CROSS-MOTION by deft., Henry A. Kissinger for summary judgment; statement of material facts; P&A's; appendices to P&A's; second affidavit of Henry A. Kissinger w/attachment; affidavit of Monroe Leigh; c/m 6-17-77.

June 20 ORDER granting defts Vance, Boorstin and Rhoads motion to consolidate C.A. Nos. 77-220 and 77-391 for all purposes. (N). Smith, J.

Aug 05 OPPOSITION of pltfs Military Audit Project, et al. to deft #3's cross-motion for summary judgment; c/m 8-4-77.

Aug 08 MEMORANDUM of points and authorities by deft Henry A. Kissinger in response to the Government's opposition to summary judgment and in opposition to its request for production of documents pursuant to a protective order; table of contents; table of authorities; c/m 8-8-77.

Aug 08 REPLY memorandum of plfts of points and authorities in support of their motion for summary judgment, in opposition to deft Kissinger's

cross-motion for summary judgment and in opposition to the Government's request for production of documents; table of contents; c/m 8-8-77. (fiat) Corcoran, J.

Aug 09 WITHDRAWAL of motion for protective order by defts; c/m 8-9-77.

Aug 22 SUR-REPLY memorandum of points and authorities in support of pltfs motions for summary judgment and in opposition to deft Kissinger's motion for summary judgment; table of contents; c/m 8-22-77.

Aug 22 REPLY memorandum of points and authorities by deft Kissinger in support of his cross-motion for summary judgment and in opposition to pltfs motions for summary judgment; table of contents; table of authorities; Exhibit; c/m 8-22-77.

Sept 28 CROSS-MOTIONS for summary judgment argued and taken under advisement. (Rep. J. Blair) Smith, J.

Dec 08 OPINION granting pltfs motions for summary judgment and deft Kissinger's motion for summary judgment will be denied; counsel to submit appropriate order within 10 days. (N) Smith, J.

Dec 16 MOTION of pltf for clarification of opinion; P&A's; attachment; c/s 12-16-77.

Dec 19 MEMORANDUM on proposed order by pltf; c/m 12-16-77.

Dec 19 OPPOSITION by deft Henry A. Kissinger to entry of proposed order; P&A's; c/m 12-19-77.

Dec 19 MEMORANDUM of points and authorities regarding pltfs proposed order effectuating the Court's December 8 Opinion; c/m 12-16-77.

Dec 20 TRANSCRIPT OF PROCEEDINGS, September 28, 1977; courts copy; pages 1-77; (Rep: J. Blair)

Dec 22 RESPONSE of deft Kissinger to memorandum of points and authorities regarding pltfs proposed order effectuating the Court's December 8 Opinion; c/s 12-22-77.

Dec 27 REPLY OF Henry A. Kissinger to pltfs motion for clarification; Exhibit A; c/s 12-27-77.

1978

Jan 05 MEMORANDUM in support of Government defts proposed order; c/m 1-5-78.

Jan 09 REPLY memorandum of points and authorities in support of pltfs motion for clarification and proposed order; Exhibit A; c/s 1-9-78.

Jan 13 RESPONSE of deft Kissinger to reply memorandum in support of pltfs motion for clarification; c/m 1-13-78.

Jan 19 MEMORANDUM by deft #3 in support of proposed order; c/m 1-19-78.

Jan 25 ORDER denying in part and granting in part cross-motion of deft Kissinger for summary judgment; granting in part and denying in part motion of pltfs for summary judgment; directing that as soon as practical the defts transfer to the custody of the Dept. of State the original

transcribed secretarial notes as set forth in this order; further directing that the Dept. of State make a determination which notes are required to be released pursuant to the Freedom of Information Act, the Court retains jurisdiction; the effectiveness of this order is stayed for a period of ten days. (see order for further details) (N) Smith, J.

Feb 03 MOTION by deft Kissinger for stay; memorandum; c/m 2-3-78.

Feb 14 MILITARY audit project by pltfs and Felice D. Cohen's opposition to motion for stay; c/m 2-13-78.

Feb 15 RESPONSE by Government defts to deft Kissinger's motion for a stay; c/m 2-78.

Feb 16 OPPOSITION by pltf to deft Kissinger's motion for a stay pending appeal; P&A's; affidavit of William E. Leuchtenburg; affidavit of William Safire; affidavit of Dr. Mack Thompson; affidavit of Nat Hentoff; affidavit of Evron M. Kirkpatrick; affidavit of Donald G. Herzberg; affidavit of Jeremiah A. O'Leary; affidavit of Richard Dudman; affidavit of Hedrick Smith; c/m 2-15-78.

Feb 21 RESPONSE to pltfs oppositions to deft Kissinger's motion for a stay pending appeal; c/m 2-21-78.

Feb 24 NOTICE of appeal by deft Kissinger from Order of 1-25-78. $5.00 paid and credited to U.S. Copy of notice of appeal mailed to Robert M. Sussman, Barbara Ward and William Dobrovir.

Feb 28 NOTICE of appeal by pltfs from order of 1-25-78. $5.00 paid and credited to U.S. Copies mailed to James Wesner, Barbara Ward and William Dobrovir.

Mar 01 MOTION of deft Kissinger to Stay pending appeal GRANTED IN PART. (OTBP) Smith, J.

Mar 02 ORDER paragraphs 7 and 8 of the Final Order entered on Jan. 25, 1978 is hereby stayed and suspended pending a final determination of the merits on appeal and it is further ordered that deft Kissinger shall have access to the notes to the extent permitted by established State Dept. regulations and policies. (N) Smith, J.

Mar 07 PRELIMINARY record on appeal delivered to USCA; Receipt acknowledged. (USCA #78-1207)

Mar 09 TRANSCRIPT OF PROCEEDINGS, March 1, 1978; courts copy; pages 1-34; (Rep: D. Copeland)

Apr 07 RECORD on appeal delivered to USCA; Receipt acknowledged 4-10-78. (USCA #78-1315)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 77-0391

MILITARY AUDIT PROJECT, et al., Plaintiffs

v.

DEPARTMENT OF STATE, et al., Defendants

Date	Nr.	Proceedings
1977		
Mar 08		COMPLAINT; appearance.
Apr 18		MOTION of pltfs for summary judgment; statement of material facts; memorandum of P&A; exhibits (14); c/m 4-14-77.
Apr 26		ANSWER of deft #2 to complaint; appearance; c/m 4-26-77.
Apr 26		ANSWER of defts #1, 3 & 4 to complaint; appearnce; c/m 4-26-77.
Apr 26		CALENDARED. CD/N
May 26		MOTION of defts Vance, Boorstin & Rhoads to consolidate CA 77-0220 & CA 77-0391; c/m 5-25-77.
June 21		COPY of order filed 6-20-77 granting defts Vance, Boorstin & Rhoads motion to consolidate CA 77-220 & 77-391 for all purposes. (N) (Original filed in CA 77-220). SMITH, J.

LIST OF RELEVANT DOCKET ENTRIES
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1207

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.

v.

CYRUS R. VANCE, individually and as Secretary of State, et al.,

HENRY A. KISSINGER, Appellant

No. Below: Civil Action 77-0220
Judge Below: John Lewis Smith, Jr.
Date of Judgment: January 25, 1978
Notice of Appeal Filed: February 24, 1978

Date	Filings — Proceedings	Filed
(A) 3-7-78	Certified Original Preliminary Record (no transcripts) (n-4) 4-21	
(A) 3-10-78	4-Appellant's motion to consolidate with No. 78-1208 (p-10)	
(A) 3-10-78	4-Appellant's motion for stay (p-10)	
(T) 3-16-78	4-Appellees (Military Audit Project) opposition to motion for stay (m-15)	
(E) 3-17-73	Clerk's order granting Appellant's motion to consolidate with No. 78-1208	

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1208

MILITARY AUDIT PROJECT, et al.

v.

DEPARTMENT OF STATE, et al.,

HENRY A. KISSINGER, Appellant

No. Below: Civil Action 77-0391
Judge Below: John Lewis Smith, Jr.
Date of Judgment: January 25, 1978
Notice of Appeal Filed: February 24, 1978

Date	Filings — Proceedings	Filed
(A) 3-7-78	Certified Original Preliminary Record (no transcripts) (n-4) 4-21	
(A) 3-10-78	4-Appellant's motion to consolidate with No. 78-1207 (p-10)	
(A) 3-10-78	4-Appellant's motion for stay (p-10)	
(T) 3-16-78	4-Appellees' (Military Audit Project, et al) opposition to motion for stay (m-15)	
(E) 3-17-78	Clerk's order granting appellant's motion to consolidate with No. 78-1207	
(A) 3-17-78	4-Appellee's (Dept. of State) response to appellant's motion for a stay (m-17)	

(A) 3-17-78	4-Appellees' (Reporters Committee for Freedom of the Press, et al.) opposition to appellant's motion for a stay (p-17)	
(A) 3-22-78	4-Appellant's response to oppositions to motion for stay pending appeal (m-22)	
(A) 3-23-78	Certified Original Record (2 vols.) (no transcripts) (n-4)	
(E) 4-3-78	Per Curiam order denying the motion for stay pending appeal and that the defendant Kissinger shall have access to the notes to the extent permitted by established State Department regulations and policies (See order for details) CJ Wright and Fahy, Senior CJ	
(C) 4-11-78	4-Appellant's motion to consolidate with No. 78-1315 and for a briefing schedule (m-11)	
(A) 4-19-78	Order per CJ Wright directing Clerk to schedule case nos. 78-1207, 78-1208 & 78-1315 argument on the merits as promptly after the briefs of the parties have been filed as the business of the Court permits, and that no. 78-1315 is consolidated with nos. 78-1207 & 78-1208 for consideration on the merits; and that a briefing schedule is set as follows: . . . and that the parties are directed to address in their briefs, among any other matters counsel be so advised, the questions: (1) whether the January 25, 1978 order of the District Court is appealable as either a final or an interlocutory decision pursuant to 28 U.S.C. Sec. 1291 and 1292 (a) (1); (2) if it is an appealable interlocutory decision, the scope of the Court's review	

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(A) 4-24-78 3-Appellant's appendix of statutes and regulations (p-24)

(A) 4-24-78 7-Joint appendix (p-24)

(A) 4-25-78 1-Copy of letter from Clerk, Supreme Court that application for stay of the order is granted pending final disposition of this court in SC No. A-856 on April 24, 1978

(A) 5-24-78 15-Appellees' (Military Audit Project, et al.) brief (m-24)

(A) 5-24-78 25-Appellees' (Reporter's Committee, etc., et al.) brief (m-24)

(T) 6-29-78 15-Brief of the United States as amicus curiae (m-29)

(T) 7-13-78 4-Letter from counsel for the United States advising of additional authorities pursuant to Local Rule 8(g)

(C) 7-17-78 25-Reply brief of Reporters Committee in response to US amicus brief (m-17) & (m-3)

(T) 7-17-78 4-Appellee's (Military Audit Project) memorandum in response to the brief of the United States as amicus curiae (m-14)

(C) 7-26-78 Order per CJ Wright that the Clerk is directed to schedule 77-2123, 77-2124 & 77-2125 and 78-1207, 78-1208 & 78-1315 on the same day and before the same panel.

(C) 8-8-78 15-Appellant's (Kissinger) reply brief (p-4)

(C) 8-29-78 4-Motion of United States for leave to lodge a document with the Court in connection with this case (m-29)

(E) 9-18-78 Clerk's order granting the motion of US for leave to lodge 15 copies of a letter of June 28th from Jay Solomon to Dr. Henry A. Kissinger

(E) 9-18-78 15-Letter of June 28th from Jay Solomon to Dr. Henry A. Kissinger

(T) 10-16-78 4-Motion of Military Audit Project for leave to file material as appendix to brief (m-13)

(E) 10-19-78 Clerk's order granting appellee's motion for leave to file appendix

(E) 10-31-78 Argued before CJ Wright*, Lumbard, US CJ for the Second Circuit and Tamm, CJ

(T) 11-3-78 4-Letter from counsel for Reporters Committee, et al. advising of additional authorities pursuant to Local Rule 8(g)

(R) 11-7-78 Judgment affirming judgment of the District Court, for the reasons set forth in the attached memorandum (n)

(T) 11-14-78 1-Appellees' (Military Audit Project) bill of costs (m-13)

(T) 11-22-78 4-Appellant's motion for stay of mandate pending application for writ of certiorari (p-22)

(T) 11-28-78	4-Appellee's (Reporters Committee) opposition to appellant's motion for stay of mandate (p-28)
(T) 11-29-78	4-Appellant's reply to appellee's opposition to appellant's motion for stay of mandate (m-29)
(D) 12-1-78	4-Appellee's (Military Audit) motion for leave to file response to motion for stay of mandate time having expired (m-30)
(E) 12-14-78	Clerk's order granting appellee's motion for leave to file response to motion for stay of mandate, time having expired
(E) 12-14-78	4-Appellee's response to motion for stay of mandate (m-29)
(E) 12-20-78	Per Curiam order granting the motion for stay of mandate and the Clerk is directed not to issue the mandate prior to January 9, 1979; CJ Wright, Lumbard, Senior CJ for the USA for 2nd Cir. and Tamm, CJ
(T) 1-9-79	Certified copy of order from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 78-1088 on January 8, 1979 and is now pending
(T) 1-10-79	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed SC No. 78-1088 on January 8, 1979
(T) 2-7-79	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed SC No. 78-1217 on February 5, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1315

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Appellants,

v.

CYRUS R. VANCE, individually and as Secretary of State, et al.

No. Below: Civil Action 77-0220
Judge Below: John Lewis Smith, Jr.
Date of Judgment: January 25, 1978
Notice of Appeal Filed: February 28, 1978

Date	Filings — Proceedings	Filed
(A) 4-7-78	Certified Original Record (1 vol. transcript) (2 vols. record) (n-4)	
(A) 4-19-78	Order per CJ Wright directing Clerk to schedule case nos. 78-1207, 78-1208 & 78-1315 argument on the merits as promptly after the briefs of the parties have been filed as the business of the Court permits, and that nos. 78-1315 is consolidated with nos. 78-1207 & 78-1208 for consideration on the merits; and that a briefing schedule is set as follows: . . . and that the parties are directed to address in their briefs, among any other matters counsel be so advised, the questions: (1) whether the January 25, 1978 order of the	

District Court is appealable as either a final or an interlocutory decision pursuant to 28 U.S.C. Sec. 1291 and 1292 (a)(1); (2) if it is an appealable interlocutory decision, the scope of the Court's review.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT FELICE D. COHEN, Director Military Audit Project Plaintiffs v. DEPARTMENT OF STATE HENRY A. KISSINGER DANIEL J. BOORSTIN Librarian of Congress JAMES B. RHOADS Archivist of the United States Defendants [Addresses of parties omitted in printing]	)	Civil Action No. 77-0391

COMPLAINT FOR ACCESS TO RECORDS

1. This is an action under the Freedom of Information Act for access to records of the Department of State, which defendant Henry A. Kissinger claims are personal records and which he has deposited with the defendant Librarian of Congress with prohibition of access by anyone except himself and his designees.

2. This court has jurisdiction pursuant to 5 U.S.C. § 552 (a)(4)(B).

3. On December 28, 1976, plaintiffs requested from defendant Department of State access, under the Freedom of Information Act, to the records of conversations of the Secretary of State, Henry A. Kissinger, with foreign heads of state, heads of government, ambassadors, foreign ministers and national security advisers ("the records"). Plaintiffs made a second request on December 29, 1976, for records of conversations of the Secretary of State with anyone.

4. By letter dated January 18, 1977, the Department of State denied the requests on the ground that the records requested were "personal" and "are not and never have been agency records of the Department of State." Plaintiffs appealed the denial. The appeal was denied on March 4, 1977. Plaintiffs have exhausted their administrative remedies.

5. Plaintiffs are persons within the meaning of the Freedom of Information Act.

6. Defendant Department of State is an agency within the meaning of the Freedom of Information Act and is the lawful custodian of the records. Defendant Henry A. Kissinger was Secretary of State until January 20, 1977, has asserted that the records are and in violation of law has treated the records as his personal property. Defendant Daniel J. Boorstin is the Librarian of Congress who, in violation of law, has accepted a physical deposit of the records in the Library. Defendant James B. Rhoads is the Archivist of the United States and has asserted jurisdiction over the records.

7. On November 11, 1976, the Legal Adviser of defendant Department of State, Monroe Leigh, Esq., stated in a memorandum to defendant Henry A. Kissinger that the records had been reviewed by the Department of State Council on Classification Policy "and found that they did *not* contain classified information" (emphasis in original).

8. The records are records of the Department of State, an agency of the United States within the meaning of 5 U.S.C. § 552, 18 U.S.C. § 641 and 44 U.S.C. §§ 3101-07, 3301-14, as implemented in regulations of the Department of State, §§ 411, 412, 417, 423, 432 and 436 of the Foreign Affairs Manual and regulations of the General Services Administration, GSA Bulletin FPMR B-65, ¶ 4(c), 41 Fed. Reg. 51149 (November 19, 1976).

9. On a date unknown, defendant Henry A. Kissinger, in violation of the provisions of law and regulations specified in paragraph 8, removed the records from the Department of State and placed them on private property in the State of New York.

10. On or about December 24, 1976, defendants Henry A. Kissinger and Daniel J. Boorstin executed a purported donation of the records to the Library of Congress, which purports to prevent access to the records by the public and all persons other than defendant Henry A. Kissinger for 25 years or five years after the death of Henry A. Kissinger, whichever is later, with unrestricted use only by Henry A. Kissinger and persons named or approved by him. Plaintiffs are informed and believe that defendant Henry A. Kissinger intends to publish the records, portions thereof or references thereto or to their contents, for his private profit, in violation of law.

11. Plaintiffs are informed and believe that on or about December 28, 1976, defendant Henry A. Kissinger, in violation of the provisions of law and regulations specified in paragraph 8, physically placed the records in the Library of Congress pursuant to the purported donation described in paragraph 10.

12. On January 4, 1977, defendant James B. Rhoads requested access to the records to determine whether they are in whole or in part records within the meaning of applicable laws and regulations. On January 18, 1977, defen-

dants Department of State and Kissinger denied the request.

13. By the acts described in paragraphs 9-12, *supra*, defendant Kissinger unlawfully converted valuable property of the United States, to wit, agency records of the Department of State, to his own use, thereby depriving plaintiffs of rights of access secured to them by the Freedom of Information Act, 5 U.S.C. § 552.

14. Plaintiffs request that this court

(a) grant plaintiffs access to the records and enjoin defendants from withholding the records;

(b) declare unlawful the removal of the records from the Department of State, their purported donation to the Library of Congress and their physical transfer to the Library of Congress;

(c) declare unlawful the restrictions on access to the records described in paragraph 10 and any other restrictions on public access save those provided in the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9);

(d) align defendant Rhoads as a plaintiff pursuant to Rule 19(a), F.R.Civ.P.;

(e) award plaintiffs their costs, expenses and attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E).

/s/ William A. Dobrovir
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March 8, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Reporters Committee for Freedom of the Press American Historical Association American Political Science Association James MacGregor Burns Nat Hentoff Donald G. Herzberg William Leuchtenburg Arthur Link J. Anthony Lukas Austin Ranney Clement E. Vose William Safire Plaintiffs vs. Cyrus R. Vance, individually and as Secretary of State	No. 77-0220

Daniel J. Boorstin, individually and as Librarian of Congress

Henry A. Kissinger

Defendants.

[Addresses of parties omitted in printing]

AMENDED COMPLAINT

Plaintiffs, for their amended complaint herein, allege as follows:

I. NATURE OF THE ACTION

1. This is a civil action for declaratory, injunctive and mandamus relief. Plaintiffs sue as individuals engaged in the professions of education, journalism, history and political science, as organizations of such individuals, and as individual citizens and taxpayers. They seek review of the Department of State's denial of their Freedom of Information Act request for the transcribed secretarial notes of the telephone conversations held by defendant Henry Kissinger during his service as Assistant to the President for National Security Affairs and Secretary of State. These notes are now in the process of being transferred to the Library of Congress pursuant to two unlawful agreements between defendants Kissinger and Boorstin that will deny the public access to them, except on such terms as defendant Kissinger determines, for twenty-five years or five years after the death of defendant Kissinger or the other parties to the conversation, whichever occurs later. Plaintiffs assert that these notes — which reflect official conversations, were prepared and edited by government em-

ployees, stored in government facilities and used by other government employees as part of their duties — have always been the property of the Department of State, and thus could not lawfully be disposed of by defendant Kissinger pursuant to private agreement. But for the unlawful agreements between defendants Kissinger and Boorstin, these historic documents would now be available for use, study and inspection by the Government and by private citizens seeking disclosure according to the established standards and procedures of the Freedom of Information Act.

This action seeks to prevent defendants Kissinger and Boorstin from effectuating the unlawful agreement transferring the notes to the Library of Congress and denying the public access thereto; to compel the Department of State, as their lawful owner, to regain custody of these notes; and to provide for an orderly examination of the notes and their release to plaintiffs and others on the basis of the standards for disclosure established by and under the Freedom of Information Act.

II. JURISDICTION AND VENUE

2. Jurisdiction is conferred on this Court by the Freedom of Information Act, 5 U.S.C. § 552, by the Administrative Procedure Act, 5 U.S.C. §§ 702-04 and by 28 U.S.C. § 1331 (federal question), § 1361 (action to compel federal officer to perform duty), and §§ 2201 and 2202 (declaratory judgment). The amount in controversy, exclusive of interest and costs, exceeds in monetary value the sum of $10,000. A substantial portion, if not all, of the documents at issue in this action are now located within the District of Columbia, in the custody of defendants Boorstin or Kissinger, and many of the pertinent acts, occurrences and omissions (including the denial of plaintiffs' Freedom of Information Act request) transpired within the District of Columbia.

Defendants are all found within, and are subject to service of process in, the District of Columbia.

III. DESCRIPTION OF THE PARTIES

3. The Reporters Committee for Freedom of the Press, founded in 1970, is the only organization in the nation exclusively devoted to protecting the First Amendment and freedom of information interests of the working press of all media. The Committee publishes a Press Censorship Newsletter, which is a compendium of all current governmental actions affecting the news media; it maintains a News Media Law Information Center and Press Law Citation Service; it conducts in-depth research projects on various First Amendment problems; and it assists reporters pursuing freedom of information claims.

4. Plaintiff American Historical Association is a membership organization composed of approximately 18,000 members who are engaged primarily in the teaching, study and writing of history. It was founded in 1884, and chartered by Congress in 1889, for the purpose of "the promotion of historical studies, the collection and preservation of historical manuscripts, and for kindred purposes in the interest of American history . . . ." The constitution of the Association mandates that it "encourage the collection and preservation of historical documents," "insure equal access to information," and "foster the dissemination of information about historical records and research." The Association publishes the *American Historical Review* and sponsors lectures, conventions and symposia where its members report and discuss their research, based on their study of original documents and other historical materials.

5. The American Political Science Association, founded in 1903, is the major professional organization in the United States devoted to research and education about the art and science of politics and government. Most of its approximately 17,000 members are political scientists teaching in colleges and universities. Its membership also includes graduate students, lawyers, journalists, federal, state and local government officials and elected political representatives. One of the principal activities of the Association is facilitating the dissemination of scholarly information of interest to those engaged in the study of political science. Toward this end, the Association publishes two quarterly journals, *The American Political Science Review* and *PS*.

6. Plaintiff James MacGregor Burns is Woodrow Wilson Professor of Political Science at Williams College and President-elect of the American Political Science Association. Plaintiff Burns has been and is engaged in a continuing study of political leadership and the Presidency. He has studied Presidential papers of several administrations. He has done research into the Presidency of Richard Nixon and intends to do further work on that subject. He is the author of several books on the Presidency and the recipient of various awards including the Pulitzer Prize in History, the National Book Award and the Francis Parkman Prize. He is co-author of a textbook entitled *Government By The People* concerning American political institutions. Said textbook is revised periodically, and plaintiff Burns is under contract with the publisher, Prentice-Hall, Inc., to supply further timely revised editions dealing with events subsequent to those covered in present editions. In order to continue his work, it is necessary that plaintiff Burns have access to the secretarial notes at issue in this action.

7. Plaintiff Nat Hentoff is a member of the Steering Committee of The Reporters Committee for Freedom of the Press. He is a staff writer for the *New Yorker Magazine*, a columnist for the *Village Voice*, and the author of a number of books on public affairs. Plaintiff Hentoff frequently writes on current public affairs and governmental problems

and has written and will continue to write about those aspects of the Nixon Administration, including the activities of the Department of State and the conduct of American foreign policy, which he believes have affected, or might in the future affect, civil liberties and civil rights.

8. Plaintiff Donald G. Herzberg is Dean of the Graduate School of Georgetown University and Professor of Government. He is the former Director of the Eagleton Institute of Politics of Rutgers University and was Executive Director of the Presidential Commission on Registration and Voting Participation. Plaintiff Herzberg has published works in the area of American government and politics, on political parties, political campaigning, elections, registration and voting and executive-legislative relations. In order to continue his scholarly pursuits of teaching and publishing, it is necessary for plaintiff Herzberg to be able to study the transcribed notes of defendant Kissinger's telephone conversations that are the subject of this litigation.

9. Plaintiff William Leuchtenburg is DeWitt Clinton Professor of American History at Columbia University. He has done research in presidential archives at the Franklin D. Roosevelt and John F. Kennedy libraries; has written books and articles on recent American history; and is now writing the final volume of the *Oxford History of the United States*, covering the period 1945-1977, which embraces the Nixon Presidency. Oxford University Press has contracted to publish this volume. Plaintiff Leuchtenburg has also contracted with Oxford University Press for a major revision of the *Growth of the American Republic*, which will include the Nixon Presidency. Plaintiff Leuchtenburg is author of *A Troubled Feast*, published by Little, Brown & Co., which covers the first Nixon term, and which plaintiff Leuchtenburg will soon revise to cover the period of the second administration. Plaintiff's ability to continue his research and writing about the Nixon years will be substantially affected if he is denied access to the important

transcribed notes of conversations at issue in this action.

10. Plaintiff Arthur Link is Edwards Professor of American History at Princeton University and Director of the Woodrow Wilson Papers there. He is engaged in a continuing study of 20th Century American history and conducts a course in 20th Century American history. He has worked extensively in the collections of papers of recent American presidents and plans to do such work and study in connection with the papers and other records of the Nixon Administration. He is the author of a textbook entitled *American Epoch*. Said textbook is in its fourth edition. Plaintiff Link intends to do revised editions in the future and such revised editions are expected by the publisher, Alfred A. Knopf. The materials at issue in this case are pertinent to and necessary to the proper preparation of such revisions.

11. Plaintiff J. Anthony Lukas is a member of the Steering Committee of The Reporters Committee for Freedom of the Press. From 1962 to 1972 he was a domestic and foreign correspondent for the *New York Times*, and he currently is a freelance writer who has published articles in the *New York Times Magazine*, *Harpers*, *Esquire*, *Saturday Review* and other publications. He is a senior editor of (MORE), a national magazine on the press. He is the author of two special issues of the *New York Times Magazine* dealing with the Watergate affair. He is a Neiman Fellow and a Pulitzer Prize winner. Plaintiff Lukas is currently preparing, and may prepare in the future, articles on the Administrations of Richard M. Nixon and Gerald Ford. In order to prepare accurate, timely and scholarly works, it is essential that plaintiff Lukas examine and study the transcribed notes of defendant Kissinger's official conversations that are at issue in this action.

12. Plaintiff Austin Ranney is Professor of Political Science at the University of Wisconsin and President of the

American Political Science Association. Plaintiff Ranney is engaged in research dealing with changing American attitudes toward their national political institutions, including the growth of the feeling of political alienation from their government on the part of the citizens of the United States, and, specifically, from the institution of the Presidency during the Nixon Administration. Plaintiff Ranney's field of study includes, in addition, the legal regulation of political campaign expenses. In order to fulfill his obligations as a scholar and author, it is necessary for plaintiff Ranney to study the transcribed notes of conversations that are the subject of this litigation.

13. Plaintiff Clement E. Vose is John E. Andrus Professor of Government of Wesleyan University and Representative of the American Political Science Association to the Archives Advisory Board of the U.S. Archives and Records Service. As Professor of Government plaintiff Vose is engaged in general research in American government and politics and has a special interest in the preparation and publication of material on a continuing basis on availability and use of scholarly material in libraries and other depositories. In order to prepare effectively and publish source material publications, it is necessary for plaintiff Vose to study the transcribed notes of conversations that are the subject of this litigation.

14. Plaintiff William Safire is a columnist for the *New York Times*. From January 20, 1969 through April 1, 1973, he was an Assistant to the President in the Nixon White House. Before his government service, Mr. Safire was an author, public relations consultant and reporter. He has written a book recounting his experiences in the Nixon White House entitled *Before The Fall* and he is the author of several columns that relate to the conduct of the Government during the Nixon and Ford presidencies. In the future, plaintiff Safire plans to write again about these subjects, as well as about the ongoing activities of the Govern-

ment, and his ability to carry out these plans will be impaired if he is unable to obtain and study the transcribed notes of conversations that are the subject of this litigation.

15. All of the plaintiffs have direct, immediate and specific legal interests in assuring that the original notes of conversations at issue in this action are preserved, maintained and controlled as property of the United States Government and its citizens. As educators, journalists, historians and political scientists, plaintiffs presently desire, and in the future will desire, to study, compile, analyze, interpret and report on the telephone conversations of defendant Kissinger reflected in the transcribed notes at issue herein. All of the plaintiffs are presently being injured by the unavailability of these materials and they will be irreparably injured in the future if the agreements between defendants Kissinger and Boorstin, described below, are carried out.

16. Defendant Cyrus R. Vance is the Secretary of State. In his official capacity, defendant Vance is responsible for seeing that the Department of State meets its obligations under the Freedom of Information Act, including the obligation to reclaim and make available to the public the Department records that are the subject of this action.

17. Defendant Daniel J. Boorstin is the Librarian of Congress. In his official capacity, defendant Boorstin executed the agreements with defendant Kissinger that effect the transfer to the Library of Congress of the transcribed secretarial notes that are the subject of this action. As Librarian of Congress, defendant Boorstin is currently the custodian of portions of those notes.

18. Defendant Henry A. Kissinger was Assistant to the President for National Security Affairs from approximately January 20, 1969 until approximately August, 1973. From that time until on or about January 20, 1977, defendant Kissinger was Secretary of State. The documents at issue in

this action are the secretarial notes of defendant Kissinger's telephone conversations during the time he held these positions. Defendant Kissinger is one of the parties to the agreements pursuant to which the notes were transferred to the Library of Congress, and he and his designees now have custody of portions of those notes.

IV. NATURE OF THE SECRETARIAL NOTES

19. On information and belief, substantially all of the telephone conversations of defendant Kissinger concerning official matters were monitored or recorded while he served as Assistant to the President for National Security Affairs and Secretary of State.

20. On information and belief, verbatim transcripts of these conversations, or secretarial notes that reflected their contents substantially verbatim, were prepared after the conversations occurred.

21. On information and belief, these transcripts or notes (both hereinafter referred to as "secretarial notes") were prepared by Government employees in the discharge of their official duties, on government time and with the aid of equipment, materials, office space and other services of the United States.

22. On information and belief, the secretarial notes of defendant Kissinger's conversations were retained in the normal course of Government business and stored in Government files.

23. On information and belief, the secretarial notes reflect the decisions, policies, deliberations, analyses, actions and contemplated actions in which defendant Kissinger and numerous other government employees participated in the course of discharging their official duties.

24. On information and belief, the secretarial notes were used as a record of official communications that could help

defendant Kissinger recall prior conversations and events and insure appropriate administrative follow-up.

25. On information and belief, the secretarial notes were reviewed by defendant Kissinger and his subordinates for these purposes while they performed Government business.

26. On information and belief, the secretarial notes pertain, in whole or in part, to the ongoing affairs of the United States and are essential to the orderly maintenance of the established policies of the Government and to the ongoing deliberations, analyses and decisions that the Government is now conducting.

27. As documents prepared by and for Government employees as part of the ongoing governmental process, the secretarial notes have always been the property of the Department of State, not of defendant Kissinger as a private ciizen, and constitute "agency records" within the meaning of the Freedom of Information Act, 5 U.S.C. § 552.

28. Under the statutes and established policies of the United States, including the Freedom of Information Act and the Federal Records Act, the officers, employees and agents of the United States are required to preserve the secretarial notes and, subject only to those exceptions provided by law, to make such notes available to the citizens of the United States, including plaintiffs, for purposes of inspection, study and reporting.

29. As journalists, historians, educators and political scientists, plaintiffs are an inherent part of the ongoing political process. This process depends on continuing and informed analysis, interpretation, and debate concerning issues of public interest and importance. Plaintiffs cannot perform this function if they are denied access to the notes of official conversations and other materials that reflect or relate to the policies, decisions and deliberations of the Government.

V. THE AGREEMENTS BETWEEN DEFENDANTS KISSINGER AND BOORSTIN

30. On November 12, 1976, defendants Kissinger and Boorstin entered into a Deed of Gift and Agreement (hereinafter the "First Agreement"). Under this Agreement, a copy of which is annexed hereto as Exhibit A, defendant Kissinger, acting as a private citizen, donated to the United States as a gift a collection of personal and governmental papers in his possession. Under paragraph 3 of the First Agreement, defendant Kissinger undertook to deliver both sets of documents to the Library of Congress within three months of the Agreement's execution.

31. Paragraph 4 of the First Agreement provides that personal papers donated to the Library will not be available to public access until 25 years after the date of the Agreement or five years after the death of defendant Kissinger, whichever is later. Under paragraph 5 of the Agreement, public access to government papers donated to the Library will be unavailable for the same period and, thereafter, will be allowed only if the originating agency of the papers in question has determined that they contain no classified or restricted information.

32. Until public access is permissible pursuant to paragraph 4, examination of papers subject to the First Agreement is limited by paragraph 5 to: (a) employees of the Library of Congress that have been jointly approved by the Librarian of Congress and defendant Kissinger; (b) persons who have received the written permission of defendant Kissinger; and (c) after defendant Kissinger's death, persons who have received the written permission of a committee to be named in defendant Kissinger's will.

33. Under paragraph 6, defendant Kissinger is permitted unrestricted access to all papers covered by the Agreement during his lifetime. The Library of Congress is required to provide defendant Kissinger with working space where he

can use the papers, and to permit examination of the papers by all research assistants of defendant Kissinger who have appropriate security clearances.

34. On November 11, 1976, Monroe Leigh, Esquire, then the Legal Adviser of the Department of State, wrote a memorandum to defendant Kissinger which considered whether the secretarial notes of defendant Kissinger's telephone conversations were the property of the Department of State, or instead were personal papers which defendant Kissinger could retain when he left office. The memorandum, a copy of which is annexed hereto as Exhibit B, concluded that the notes were not agency records but personal papers and therefore were the private property of defendant Kissinger.

35. On December 24, 1976, defendants Kissinger and Boorstin entered into a Second Deed of Gift And Agreement (hereinafter "Second Agreement"). Under this Agreement, a copy of which is annexed hereto as Exhibit C, defendant Kissinger donated to the Library of Congress the "transcribed secretarial notes of his telephone conversations." The Second Agreement incorporates by reference all the terms and conditions of the first Agreement of November 12, 1976 and further provides that public access to the notes will be permitted only with the consent, or upon the death, of the other parties to the telephone conversation in question. Thus, except when defendant Kissinger decides to release them to the public or to selected individuals, the notes of his telephone conversations will become available to interested persons such as plaintiffs only after this further condition has been met *and* after the passage of twenty-five years or five years from defendant Kissinger's death, whichever is later.

36. While the Second Agreement vests nominal title to the secretarial notes in the Library of Congress, the prerogatives and incidents of ownership remain with defendant Kissinger, and the notes are effectively still held as his

private property.

37. The Second Agreement would allow a private citizen, defendant Kissinger, to draw a curtain of secrecy over important policies, decisions and deliberations of the United States Government from January 20, 1969 through January 20, 1977.

38. The Second Agreement is void, and of no force and effect, for the following reasons, among others:

(a) The secretarial notes of defendant Kissinger's official conversations have always been the property of the Department of State, not of defendant Kissinger as a private citizen, and therefore could neither be transferred, donated or otherwise disposed of by a private citizen;

(b) The secretarial notes of defendant Kissinger's official conversations are "agency records" within the meaning of the Freedom of Information Act, 5 U.S.C. § 552 and enforcement of the terms of the Second Agreement would therefore deprive plaintiffs and others of their right to be informed of, and to have access to, the decisions, policies and deliberations of the Government as provided by that Act;

(c) The Second Agreement would deny plaintiffs access to and use of information concerning government policies, decisions and deliberations equal to the access available to defendant Kissinger and his designess and thus violates the First and Fifth Amendments to the United States Constitution;

(d) The Second Agreement violates the requirements of 44 U.S.C. §§ 3301-14, which establish strict and exclusive procedures for the disposal of records of the Government and which provide that records having "administrative, legal, research, or other value" should be retained;

(e) The Second Agreement violates Article IV, Section 3 of the Constitution, which provides that officers and employees of the United States lack the power and authority to dispose of or transfer property of the United States except

as authorized by rules and regulations established by Congress; and

(f) The Second Agreement is in violation of 44 U.S.C. §§ 3101-07, which require each federal agency (i) to preserve records relating to the "organization, functions, policies, decisions, procedures and essential transactions of the agency. . . ," (ii) to establish a continuing program for the "creation, maintenance and use of records in the conduct of current business. . . ," (iii) to "establish safeguards against the removal or loss of records" deemed to be necessary and required by the agency, and (iv) to inform and assist the Administrator of General Services and the Attorney General in the prevention of "any actual, impending or threatened unlawful removal, defacing, alteration or destruction of records in the custody of the agency. . . ."

39. Even if the Second Agreement had been entered into by defendant Kissinger in his official capacity as Secretary of State, or were now so construed, it would still be void, and of no force and effect, for the following reasons:

(a) The Second Agreement violates the procedures for disposing of Executive Branch records required under 44 U.S.C. §§ 3301-14 and therefore is contrary to Article IV, Section 3 of the Constitution; and

(b) The Second Agreement would deny plaintiffs and other members of the public access to the secretarial notes on the same terms as defendant Kissinger and his designees and thus violates the First and Fifth Amendments to the Constitution.

40. In agreeing to the terms of the Second Agreement, defendant Boorstin has exceeded his lawful authority as Librarian of Congress. Accordingly, the Library of Congress has no legal right to the secretarial notes of defendant Kissinger's telephone conversations and its continued possession of those notes is contrary to law.

VI. THE ARCHIVIST'S REQUEST

41. By a letter dated January 4, 1977 to defendant Kissinger, the Archivist of the United States indicated that portions of the secretarial notes covered by the Second Agreement might be official records which the United States Government had an obligation to retain. The letter, a copy of which is annexed hereto as Exhibit D, cited the Archivist's responsibilities under Federal statutes (44 U.S.C. §§ 2103, 2904, 2905 and 3303a and 44 U.S.C. § 2107) and requested that GSA archivists be permitted to review defendant Kissinger's secretarial notes to determine whether they met the definition of official records under these laws.

42. In a memorandum dated January 14, 1977, Monroe Leigh, Esq. considered the Archivist's request and concluded that it was improper. *Inter alia*, the memorandum, a copy of which is annexed as Exhibit E hereto, reaffirmed the Department's position that the secretarial notes of defendant Kissinger's conversations were his personal records. Relying on this memorandum, defendant Kissinger informed the Archivist that his request was being rejected in a letter dated January 18, 1977.

VII. PLAINTIFF SAFIRE'S FREEDOM OF INFORMATION ACT REQUEST

43. By a letter dated January 14, 1976, plaintiff William Safire submitted to the Department of State a request under the Freedom of Information Act for all transcripts of defendant Kissinger's official conversations that were encompassed by one of the following two descriptions:

> "1. Please send me photocopies of all transcripts (including rough drafts, if such exist) in which my name appears.
>
> "2. Please send me photocopies of all transcripts (including rough drafts, if such exist) of

> conversations between Mr. Kissinger and General Haig, or Mr. Kissinger and Attorney General John Mitchell, or Mr. Kissinger and J. Edgar Hoover, or Mr. Kissinger and any other official of the FBI, or of Mr. Kissinger and President Richard Nixon, in which the subject of 'leaks' of information was discussed."

This Freedom of Information Act request is attached as Exhibit F hereto.

44. By letter dated February 11, 1976, the Director of the Department's Freedom of Information Staff informed plaintiff Safire that his request had been denied. As one reason for that denial, the letter asserted that the materials sought "are not records of the Department of State or of any other 'agency' and, thus, are not 'agency records' within the meaning of the Freedom of Information Act."

45. By letter dated February 24, 1976, plaintiff Safire appealed the denial of his Freedom of Information Act request to the Chairman of the Department's Council on Classification Policy. This letter exercising plaintiff Safire's right of appeal is attached hereto as Exhibit G.

46. By letter dated March 29, 1976, plaintiff Safire's appeal was denied. As one reason for this action, the Chairman of the Department's Council on Classification Policy asserted that the "memoranda of telephone conversations have not been preserved as evidence of Department of State business" and reiterated the position that the documents sought "are not 'agency records' within the meaning of the Freedom of Information Act."

VIII. THE FREEDOM OF INFORMATION ACT REQUEST OF THE REMAINING PLAINTIFFS

47. By a letter dated January 13, 1977, plaintiffs, through their attorneys, submitted to the Department of State a

request under the Freedom of Information Act for, *inter alia:*

> "All transcribed secretarial notes of the telephone conversations held by Henry Kissinger during his government service as Assistant to the President for National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State, extending through the present time. These documents include all of the 'transcribed secretarial notes of [Secretary Kissinger's] telephone conversations' referred to in the Second Deed of Gift and Agreement, dated December 24, 1976, between Secretary Kissinger and Daniel J. Boorstin, Librarian of Congress."

A copy of plaintiffs' request is annexed hereto as Exhibit H.

48. By a letter dated January 28, 1977, the Department denied plaintiff's request for access to the secretarial notes of defendant Kissinger's official telephone conversations. A copy of this letter is annexed hereto as Exhibit I. As the ground for its denial of plaintiffs' request, the Department asserted that the notes were not "agency records" subject to the Freedom of Information Act and, in any event, the notes were no longer in the Department's custody:

> "The first part of your request pertains solely to the secretarial notes of telephone conversations involving former Secretary of State Kissinger. As you are aware, the Department's Legal Adviser concluded last year that these papers are not agency records under either the Freedom of Information Act or the Department of State regulations on record keeping. Instead, under the Department's regulations, these notes could be retained by Secretary Kissinger when he left office.

> "These conclusions are reflected in memoranda of the Legal Adviser, dated November 11, 1976 and January 14, 1977. Based on these conclusions, Dr. Kissinger donated all of the notes in question to the Library of Congress. All of the notes have been delivered to the Library of Congress, and they are presently owned by and in the custody of the Library."

The letter also stated that, because of the ground for the denial, an appeal to the Department's Council on Classification Policy was necessary neither under Department regulations nor under the Freedom of Information Act:

> "In conclusion, the Department cannot accede to the first portion of your request, on the ground that the papers requested are not agency records of the Department of State and are not in the custody or control of this Department. It is our view that this portion of your request is not technically subject to an appeal because the Department's appeal procedures (22 CFR 6.8) apply only where there has been a denial of existing "agency records" under one of the statutory exemptions of the Freedom of Information Act."

49. In order to discharge the functions and responsibilities of his profession, each of the plaintiffs has a particular and substantial need to obtain access to the secretarial notes of defendant Kissinger's phone conversations. Plaintiffs have in the past engaged in, and intend in the future to engage in, research, writing, analysis, interpretation and reporting on matters of current and historical importance and interest, including the Presidency and the decisions, policies and deliberations of the Government. Some of the plaintiffs are subject to contracts and professional commitments to publish books and other studies of the Nixon Administration. Their ability to fulfill

their responsibilities will be thwarted if their right of access to the presidential materials is temporarily or permanently denied. Plaintiffs will also be damaged if access is granted to defendant Kissinger or his designees prior to the time that plaintiffs have access to such materials.

50. The secretarial notes of defendant Kissinger's conversations constitute valuable, irreplaceable information resources of profound importance to plaintiffs in the conduct of their professions, and plaintiffs will be irreparably injured if custody of these materials remains in the Library of Congress under the terms specified by the two Agreements.

WHEREFORE, plaintiffs pray:

(a) That the Court declare that legal and equitable title to the secretarial notes has always been in the Department of State and not in defendant Kissinger;

(b) That the Court declare the First and Second Agreements to be null, void and of no legal effect insofar as they purport to effect a transfer from defendant Kissinger as a private citizen to the Library of Congress of the transcribed secretarial notes of defendant Kissinger's official telephone conversations;

(c) That the Court declare that the secretarial notes are now, and always have been, "agency records" subject to the Freedom of Information Act;

(d) That the Court issue an order in the nature of mandamus requiring the Librarian of Congress, defendant Boorstin, to relinquish custody over the secretarial notes and the Secretary of State, defendant Vance, to re-possess them;

(e) That the Court issue an order requiring the Secretary of State to produce to plaintiffs all the secretarial notes except those exempt from disclosure under one of the specific exemptions of the Freedom of Information Act;

(f) That the Court issue an order impounding the

secretarial notes of Secretary Kissinger's telephone conversations during the pendency of this action so that the notes will not be destroyed or modified and so that plaintiffs are assured of access to the notes on an equal footing with defendant Kissinger and his designees in the event they prevail in this action; and

(g) That the Court order such further relief as it may deem just and proper bearing in mind the rights of the plaintiffs to have access to governmental information.

/s/ Charles A. Horsky
Charles A. Horsky

/s/ Peter Barton Hutt
Peter Barton Hutt

/s/ Robert Matthew Sussman
Robert Matthew Sussman

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys For Plaintiffs

Dated: March 21, 1977

EXHIBIT A

DEED OF GIFT AND AGREEMENT

Henry A. Kissinger hereby donates to the United States of America, to be held and administered by the Library of Congress and its officials, as a gift to the nation, a collection of the papers relating to his years of government service and other periods of his life ("the Collection"). The Collection shall contain the papers described in a schedule to be prepared and attached hereto. In implementing this gift and as conditions to its donation, Henry A. Kissinger and the Library of Congress ("the Library") agree to the following:

1. *Purposes.* This Deed of Gift and Agreement are undertaken in order to assure —

   (a) That the Collection may be preserved for future historical and public use.
   (b) That national security information is protected.
   (c) That Henry A. Kissinger may have access to the Collection, so that he may prepare a historical account of his years in government, and so that he may in the future give information and testimony that may be requested of him concerning his years in office.
   (d) That rights of privacy and the reputations of other persons may be protected for a reasonable time.

2. *Papers in the Collection; Government Approval.* The Collection shall consist of (a) personal papers of Henry A. Kissinger ("Personal Papers"); and (b) copies of government papers of which there is an original or record copy in government files ("Government Papers"). The Personal Papers shall include handwritten notes, private letters, papers dating from Henry A. Kissinger's years at Harvard University, and similar materials. The copies of Government Papers are those which Henry A. Kissinger worked on or reviewed during his government service, and which

authorized officials have approved for inclusion in the Collection. Pre-existing government privileges with respect to copies of Government Papers in the Collection shall not be affected by this gift.

3. *Delivery of Papers.* Personal Papers in the Collection will be delivered to the Library within three months after the date this Deed of Gift and Agreement is signed. Copies of Government Papers to be included in the Collection will be delivered to the Library after they are reviewed by government officials with authority over the records, to assure that no original or record copies are included in the Collection, and will be delivered to the Library within three months after the date this Deed of Gift and Agreement is signed. Following each delivery of papers to the Library, the Library shall send to Henry A. Kissinger a written acknowledgment of the delivery.

4. *Future Public Access to Personal Papers.* Personal papers shall be made available for public access, but not until 25 years after the date of this Deed of Gift and Agreement, or until five years after the death of Henry A. Kissinger, whichever is later.

5. *Future Public Access to Copies of Government Papers.* The copies of Government Papers in the Collection shall be available for public access, but not until the period of time provided in paragraph 4 has elapsed; however, such papers shall not be available for public access unless the originating agency has determined that a paper contains no classified or restricted information.

6. *Use by Henry A. Kissinger.* Henry A. Kissinger shall have unrestricted access to all papers in the Collection during his lifetime. The Library shall make available to Henry A. Kissinger working space where he may use the Collection and other materials of the

Library. A research assistant or assistants engaged by Henry A. Kissinger shall be given access to the Collection, provided they have appropriate and current government-approved security clearances.

7. *Use by Others During Interim Period.* Until the period described in paragraph 4 has elapsed, access to the Collection shall be limited (a) to such employees of the Library as may be jointly approved by the Librarian of Congress and Henry A. Kissinger; (b) to persons who have received the written permission of Henry A. Kissinger; and (c) after the death of Henry A. Kissinger, to persons who have received the written permission of a committee to be named in Henry A. Kissinger's will. Henry A. Kissinger shall, during this period, be promptly notified by the Library of Congress of any requests, claims, or legal actions relating to papers in the Collection. No person may have access under this paragraph to any classified paper in the Collection unless he has an appropriate and current government-aproved security clearance commensurate with the classification of the paper.

8. *Additions.* Henry A. Kissinger may in the future donate additional personal papers and materials to be added to the Collection. Such additional personal papers and materials shall be governed by this Deed of Gift and Agreement. Their delivery shall be accompanied or preceded by a letter or statement signed by Henry A. Kissinger, and the Library shall send to Henry A. Kissinger a written acknowledgment of each delivery.

Witnessed and agreed to, this 12th day of November, 1976.

/s/ Henry A. Kissinger
Henry A. Kissinger

Accepted and agreed to on behalf of the Library of Congress, this 12th day of November, 1976.

/s/ Daniel J. Boorstin
Daniel J. Boorstin
Librarian of Congress

EXHIBIT C

SECOND DEED OF GIFT AND AGREEMENT

Henry A. Kissinger hereby donates to the United States of America, to be held and administered by the Library of Congress and its officials as part of a collection of papers of Henry A. Kissinger, additional personal papers consisting of the transcribed secretarial notes of his telephone conversations. In implementing this gift and as conditions to its donation, Henry A. Kissinger and the Library of Congress agree to the following:

1. The terms and conditions of the Deed of Gift and Agreement executed on November 12, 1976 by Henry A. Kissinger and the Librarian of Congress ("First Deed of Gift") are hereby incorporated by reference and extended to the present gift, except as provided in paragraph 2 below.

2. At the end of the period of time described in paragraph 4 of the First Deed of Gift, any paper included in this Second Deed of Gift shall become available for public access unless one of the parties to the telephone conversation is still living in which case such a paper shall become available for public access only with his consent or upon his death.

Witnessed and agreed to, this 24th day of December, 1976.

/s/ Henry A. Kissinger
Henry A. Kissinger

Accepted and agreed to on behalf of the Library of Congress, this 25th day of December, 1976.

/s/ Daniel J. Boorstin
Daniel J. Boorstin
Librarian of Congress

EXHIBIT D

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

National Archives and Records Service
Washington, D.C. 20408

January 4, 1977

Honorable Henry Kissinger
Secretary of State
Washington, D.C. 20520

Dear Mr. Secretary:

It has come to my attention that materials relating to your public service are being deposited in the Library of Congress under terms that are based upon the presumption that such materials are or were personal property. Among these materials you have included a set of transcripts or notes that were systematically kept reflecting the substance of telephone conversations.

I recognize that you obtained the advice of legal counsel in the Department of State concerning those telephone transcriptions. I also appreciate fully the sensitive nature of your responsibilities in the national security and foreign relations areas and the concomitant requirement that candid and unguarded conversation in the conduct of foreign relations must be duly protected.

Nevertheless, as Archivist of the United States, by authority delegated to me by the Administrator of General Services, I am responsible by law (sections 2103, 2904, 2905, and 3303a of title 44, United States Code) for ascertaining that Federal agencies create, maintain and dispose of their records in an efficient and lawful manner, and that they preserve records of permanent historical value for eventual deposit in the national archival system. Further, in accordance with Title I of the Presidential Recordings and

Materials Preservation Act (P.L. 94-526; 44 U.S.C. 2107 note), I am responsible for assuming custody and control of the Presidential historical materials of the Nixon administration. I believe those statutory authorities and responsibilities require that I conduct an inspection of the documentary materials mentioned above to verify the conclusions made and actions taken concerning them.

To carry out these responsibilities I enlist your cooperation in permitting qualified archivists from my staff to be given the opportunity to examine the telephone transcriptions and any related documents that you have deposited with the Library of Congress. These professional archivists will determine whether such materials are, indeed, personal property or whether some portions of them may be Federal records or Nixon historical materials. I guarantee the protection of any confidential information which these archivists may encounter during their inspection. In addition, I ask your cooperation as Secretary of State in providing access to any memoranda of conversations or other pertinent records in the Department of State that may assist our archivists in carrying out their task.

I would appreciate your making arrangements with the Librarian of Congress so that my staff can have access to these materials for the purposes of this determination. When the process is completed I plan to formulate a report, including recommendations, which I shall transmit to you and, as appropriate, to officials in the White House and the Department of State.

Sincerely,

/s/ James B. Rhoads
JAMES B. RHOADS
Archivist of the United States

EXHIBIT F

THE NEW YORK TIMES
WASHINGTON BUREAU
1920 L Street, N.W.
Washington, D.C. 20036
(202) 293-3100

William Safire

January 14, 1976

The Secretary of State
State Department
Washington, D.C.

Sir:

Under the provisions of the Freedom of Information Act, as amended, I request information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department.

For verification of the existence of such records, your attention is called to "Federal Defendant Kissinger's responses to plaintiffs' first set of interrogatories", Civil Action No. 1187-13 in the U.S. District Court for the District of Columbia, pp. 46-47, which reads:

"With respect to records of telephone conversations in which I participated and correspondence I wrote or received during the period January 21, 1969 through February 12, 1971:

"Business telephone conversations from my White House office during this period were usually monitored by my personal secretaries and records prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted.

"Correspondence was deposited with White House Central Files or Substantive Files.

"71 B. Where and in whose custody are such records

now? If you do not know where they are now, where and in whose custody were they last, to your knowledge?

"Response: All such records, with the exception of the records of my telephone calls, are in the White House. They are in the custody of the NSC staff. The telephone records are in the State Department, in the custody of Mr. Lawrence S. Eagleburger.

signature
HENRY A. KISSINGER"

1. Please send me photocopies of all transcripts (including rough drafts, if such exist) in which my name appears.

2. Please send me photocopies of all transcripts (including rough drafts, if such exist) of conversations between Mr. Kissinger and General Haig, or Mr. Kissinger and Attorney General John Mitchell, or Mr. Kissinger and J. Edgar Hoover, or Mr. Kissinger and any other official of the FBI, or of Mr. Kissinger and President Richard Nixon, in which the subject of "leaks" of information was discussed.

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. I therefore request that, if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my right to appeal any such decisions.

If you determine that some or all of the requested information is exempt from release, I would appreciate your advising me as to which exemption(s) you believe covers the information which you are not releasing.

I am prepared to pay costs specified in your regulations for locating the requested files and reproducing them.

As you know, the amended Act permits you to reduce or waive the fees if that "is in the public interest because furnishing the information can be considered as primarily benefiting the public." I believe that this request plainly fits that category and ask you to waive any fees.

If you have any questions regarding this request, please telephone me at the number on this letterhead.

As provided for in the amended Act, I will expect to receive a reply within ten working days.

Sincerely yours,

William Safire
Social Security #: 103 22 7703
Date of Birth: 12/17/29
Place of Birth: New York, USA

EXHIBIT G

THE NEW YORK TIMES
WAHINGTON BUREAU
1920 L Street, N.W.
Washington, D.C. 20036
(202) 293-3100

William Safire

February 24, 1976

Assistant Secretary of State for Public Affairs
Chairman, Council on Classification Policy
Department of State
Washington, D.C. 20520

Case No. 610050

Sir:

This is to appeal the denial of my request for information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department.

In the State Department denial dated Feb. 11, 1976, in paragraph one of page two, it is stated: "The documents are in rough draft form and have never been reviewed for accuracy." That statement is false. I know from personal observation that in some instances, Henry A. Kissinger reviewed the rough draft of what purported to be a verbatim transcript of a telephone conversation, made changes, and ordered the document retyped. I request the names of those members of the Office of Legal Adviser and other personnel of the State Department who were responsible for the preparation of the February 11 letter, as well as the names of those who prepare the answer to this appeal.

In paragraph 2 of page two, it is stated: "The documents are not subject to the Freedom of Information Act. Both because of the nature of the documents and because of Dr. Kissinger's position at the time the documents were made,

they are not records of the Department of State or of any other 'agency' and, thus, are not 'agency records' within the meaning of the Freedom of Information Act."

If the documents are not those of any agency, what are they? Does Secretary Kissinger claim that they are his personal property and not that of the U.S. Government? Or does he claim that these are "White House papers"? If they are White House papers, why were they taken from the White House? The White House, which is aware of the existence of these papers, has made no claim to recover them. The only set of these papers exists at the State Department, with a State Department custodian, and it is ludicrous to pretend that they are the only White House papers not at the White House.

In paragraph 3. of the denial, the Department says: "Even if the documents in question were considered to be 'agency records' within the meaning of the Act, they would appear to fall clearly within Exemption 5 of that Act. In addition, other specific statutory exemptions, notably Exemption 1, would be applicable, as would claims of invasion of privacy."

"They would appear to fall clearly" is nonsense. "They would appear" is tentative and conditional; "clearly" is certain and unconditional. Exemption 5 centers on the formulation of policy. The policy on leaks was adopted early in 1969; discussions of leaks and complaints thereof following that time did not deal with the formulation of policy. The Department's claim of exemption 5 to conceal discussions about leaks which took place after the policy was laid down is without merit: an additional claim of invasion of privacy, especially in those matters concerning this appellant, is in error.

As to Exemption 1: Undoubtedly, some classified information exists in those documents, but I have not requested classified information. I have requested all tran-

scripts of conversations "in which the subject of 'leaks' of information was discussed." Such discussions cannot be said to be classified. The material I have requested can be separated from the documents, as is frequently done with many Freedom of Information requests.

Since you have claimed Exemption 1, would you please inform me if these documents have been "properly classified pursuant to such executive order."

In paragraph 4 of the denial, the Department states: "Beside falling outside the purview of the Freedom of Information Act, the docu nents are not contained in any file which is retrievable or indexed by any name or identifying symbol or code; therefore, they are not subject to disclosure under the Privacy Act, 5 U.S.C. 552a."

If this were true, then the Privacy Act, 5 U.S.C. 552a could be circumvented simply by refraining from indexing material that ought to be available to citizens.

In your reply to this appeal, please describe the method by which these documents are kept. All in a jumbled-up pile, or in file cabinets; no order, or in chronological order; in illegible form, or in typed sheets; any cross-referencing or number of subject headings. Can file clerks, going through the documents in chronological order, find the information requested without leaving a single location?

The final paragraphs of your denial of these records asserts that "this letter is not a denial of a 'record'" as defined in your regulations.

A record cannot exist in some kind of bureaucratic limbo; a record must have a home.

These records, made on government time by government personnel on government material, are located at the State Department and no place else. These records have been publicly described, rightly or wrongly, by the State Department custodian as "working papers" of the Secretary of

State. To hold that they are not State Department papers is to make a claim that defies reason and the law.

Accordingly, I demand that you make available to me those portions of those documents previously requested as soon as diligent application of clerical help makes feasible.

Very truly yours,

/s/ William Safire
William Safire

EXHIBIT H

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

January 13, 1977

The Director
Freedom of Information Staff
Bureau of Public Affairs
Department of State
Washington, D.C. 20520

Dear Sir:

On behalf of the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association and the eight individuals identified below, we request access, pursuant to the Freedom of Information Act, to the following documents and materials:

1. All transcribed secretarial notes of the telephone conversations held by Henry Kissinger during his government service as Assistant to the President for National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State, extending through the present time. These documents include all of the "transcribed secretarial notes of [Secretary Kissinger's] telephone conversations" referred to in the Second Deed of Gift And Agreement, dated December 24, 1976, between Secretary Kissinger and Daniel J. Boorstin, Librarian of Congress;

2. All other secretarial notes, transcripts, recordings or other materials that reflect, verbatim or substantially verbatim, the contents of the conversations, telephonic and otherwise, held by

Henry Kissinger during his government service as Assistant to the President For National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State, extending through the present time.

Based on the November 24, 1976 Deed of Gift and Agreement and on a Memorandum to the Secretary of Mr. Monroe Leigh, Esq., dated November 11, 1976, it is our understanding that the Department takes the position that the materials we are requesting are the personal property of Secretary Kissinger and, as such, are not "agency records" subject to disclosure under the Freedom of Information Act. While we vigorously dispute the validity of this position, we recognize that it necessarily requires the denial of our request and makes both the request and any subsequent appeal futile.

On the assumption that our understanding of the Department's position is accurate, we are therefore proposing a procedure for eliminating unnecessary paperwork and bringing this matter before an appropriate court without undue delay. We ask the Department to reiterate, in writing, its formal position that the materials we are seeking do not constitute "agency records" covered by the Freedom of Information Act, to state that our request would necessarily have to be denied for this reason, and to agree not to contest our standing under the Freedom of Information Act to obtain judicial review of the Department's rationale for that denial. As an alternative to the above procedure, we ask simply that the Department expedite the processing of our request so that an initial denial and unsuccessful appeal are completed as soon as possible.

We understand that a portion of the materials we are requesting is still in the physical custody of the Department. Until legal proceedings growing out of this Freedom of Information Act request have been resolved, we believe it would be highly improper for the Department to relinquish

custody of these materials and we therefore urge the Department to refrain from taking any such actions. At the same time, we are prepared to maintain that the Department's obligation to provide the materials encompassed by our request is a continuing one and must be discharged regardless of where the materials may physically reside at any given time.

Before closing this letter, we would like to state again our clients' reasons for challenging the Department's publicly announced position that the transcripts are "private diaries."

For eight years, Secretary Kissinger has reportedly had several secretaries making nearly verbatim summaries of his official conversations. According to Mr. Leigh's memorandum, Secretary Kissinger has used these summaries repeatedly and continuously as an aid to performing his duties. If these reports are accurate, the summaries reflect a high public official making records of his official conversations during the course of his public employment, using these records over and over again as part of his employment, and utilizing government employees and facilities to prepare, edit and store the resulting documents. Therefore, our clients take the position that the materials we seek are the property of the people and government of the United States, not of Mr. Kissinger, and that, like the official work records of all other public employees, access to them must be governed by the Freedom of Information Act, not the personal predilections of Secretary Kissinger.

Our clients' resolve in this matter is reinforced by the character of these materials, which probably constitute the most valuable collection of background materials ever assembled on the conduct of American foreign policy because of their volume and accuracy and because of the uniquely influential role Secretary Kissinger has played over the past eight years. In addition, our clients believe

that these documents will disclose much important information about domestic politics, perhaps including the Watergate resignation crises. In short, if disclosed, these materials may be of enormous value to historians, political scientists and journalists carrying out their obligations to inform the public about the conduct of its government on important issues over the past eight years.

Our clients' position is precisely that advanced by the Reporters Committee, the American Historical Association and the American Political Science Association in the case of *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975) — that Mr. Nixon's work product as a President belongs to the public and not to Mr. Nixon. The Department should be informed that, as in that case, should you deny our request, all of the groups and individuals listed below have authorized a lawsuit to be brought promptly on their behalf.

Sincerely yours,

/s/ Charles A. Horsky
Charles A. Horsky

/s/ Peter Barton Hutt
Peter Barton Hutt

/s/ Robert Matthew Sussman
Robert Matthew Sussman

Attorneys for:
The Reporters Committee for Freedom of the Press
American Historical Association
American Political Science Association
James MacGregor Burns
Nat Hentoff
Donald G. Herzberg

William Leuchtenburg
Arthur Link
J. Anthony Lukas
Austin Ranney
Clement E. Vose

cc: Monroe Leigh, Esq.
Michael Sandler, Esq.

EXHIBIT I

DEPARTMENT OF STATE
THE LEGAL ADVISER
Washington

January 28, 1977

Charles A. Horsky, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Horsky:

I write in response to your letter of January 13, 1977, in which you request, on behalf of a number of individuals and organizations, access under the Freedom of Information Act to (1) "all transcribed secretarial notes of the telephone conversations held by Henry Kissinger during his government service" from January 20, 1969 onwards, and (2) "all other secretarial notes, transcripts, recordings or other materials that reflect, verbatim or substantially verbatim, the contents of the conversastions, telephonic and otherwise, held by Henry Kissinger" during the same period.

The first part of your request pertains solely to the secretarial notes of telephone conversations involving former Secretary of State Kissinger. As you are aware, the Department's Legal Adviser concluded last year that these papers are not agency records under either the Freedom of Information Act or the Department of State regulations on record keeping. Instead, under the Department's regulations, these notes could be retained by Secretary Kissinger when he left office.

These conclusions are reflected in memoranda of the Legal Adviser, dated November 11, 1976 and January 14, 1977.

Based on these conclusions, Dr. Kissinger donated all of the notes in question to the Library of Congress. All of the notes have been delivered to the Library of Congress, and they are presently owned by and in the custody of the Library.

Also pursuant to Department of State regulations, extracts from several of the notes have been prepared and delivered to the Department of State for inclusion in Departmental record files. It appears that the first part of your request pertains only to the actual secretarial notes and not to these extracts.

The second part of your request extends to any materials other than the papers covered by the first part, which reflect "verbatim or substantially verbatim" the contents of any conversations "telephonic and otherwise" involving former Secretary of State Kissinger. This portion of the request would appear to include a broad range of materials including memoranda of meetings in which the Secretary of State participated. Verbatim or substantially verbatim memoranda were prepared for virtually every formal meeting in which Secretary Kissinger participated, by notetakers present at these meetings.

In the Department's view, this portion of the request is unreasonably broad, and does not reasonably and with sufficient particularity describe documents subject to a Freedom of Information Act request. It is our belief that it was not the intention of the Congress, in enacting the Freedom of Information Act, to require agencies to devote their resources to respond to sweeping and indiscriminate requests, and thereby subordinate the general public interest to the desire of a few individuals or groups to peruse a broad range of documents.

In conclusion, the Department cannot accede to the first portion of your request, on the ground that the papers requested are not agency records of the Department of

State and are not in the custody or control of this Department. It is our view that this portion of your request is not technically subject to an appeal because the Department's appeal procedures (22 CFR 6.8) apply only where there has been a denial of existing "agency records" under one of the statutory exemptions of the Freedom of Information Act. Nevertheless, you would not be precluded from requesting the Department to reconsider its position based on additional written arguments or information.

The Department cannot accede to the second portion of your request, on the ground that although the papers covered may in many instances be agency records, the request is unreasonably broad and does not reasonably describe documents subject to a Freedom of Information Act request. Again, it is our view that this position is not technically subject to an appeal under the Department's regulations. Again, however, you would not be precluded from requesting the Department to reconsider this position based on additional written argument or information.

Sincerely,

/s/ George H. Aldrich
George H. Aldrich
Acting Legal Adviser

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil Action
DEPARTMENT OF STATE, et al., Defendants.	)	No. 77-0391

MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for summary judgment declaring that:

(1) the secretarial notes of conversations of former Secretary of State Kissinger are agency records of the Department of State subject to the Freedom of Information Act, 5 U.S.C. § 552 ("the FOIA");

(2) any restrictions on access to such records, save those expressly provided in the FOIA, are unlawful;

(3) the records are not properly classified or otherwise exempt from disclosure under FOIA Exemption 1, 5 U.S.C. § 552(b)(1), or exempt under any other FOIA exemption;

and ordering that plaintiffs be given immediate access to the records for inspection and copying.

Plaintiffs request a hearing on this motion.

Respectfully submitted,

/s/ William A. Dobrovir
WILLIAM A. DOBROVIR
ANDRA N. OAKES
DAVID L. SCULL
2005 L Street, N.W.
Washington, D.C. 20036
Attorneys for Plaintiffs

April 14, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil Action
DEPARTMENT OF STATE, et al., Defendants.	)	No. 77-0391

STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO
GENUINE ISSUE

1. The complaint in this action was filed on March 8, 1977, and served on defendant Department of State on March 10, 1977, on defendants Daniel Boorstin, Librarian of Congress, and James B. Rhoads, Archivist of the United States, on March 14, 1977, and on defendant Henry A. Kissinger on March 24, 1977. More than twenty days have elapsed since service on the last defendant served. More than thirty days have elapsed since service on all defendants except Henry A. Kissinger, but no responsive pleading has yet been received despite the express 30-day requirement of law. 5 U.S.C. § 552(a)(4)(C).

2. On December 28, 1976, plaintiffs requested from defendant Department of State access, under the Freedom of Information Act, to the records of conversations of the Secretary of State, Henry A. Kissinger, with foreign heads of state, heads of government, ambassadors, foreign ministers and national security adivsers ("the records") (Exhibit 1). Plaintiffs made a second request on December 29, 1976, for records of conversations of the Secretary of State with anyone (Exhibit 2).

3. By letter dated January 18, 1977 (Exhibit 3), the Department of State denied the requests on the ground that

the records requested were "personal" and "are not and never have been agency records of the Department of State." Plaintiffs appealed the denial (Exhibit 4). The appeal was denied on March 4, 1977 (Exhibit 5). Plaintiffs have exhausted their administrative remedies.

4. On November 11, 1976, the Legal Adviser of defendant Department of State, Monroe Leigh, Esq., stated in a memorandum to defendant Henry A. Kissinger that the records had been reviewed by the Department of State Council on Classification Policy "and found that they did not contain classified information" (Exhibit 6; emphasis in original).

5. On or about December 24, 1976, defendants Henry A. Kissinger and Daniel J. Boorstin executed a purported donation of the records to the Library of Congress, which purports to prevent access to the records by the public and all persons other than defendant Kissinger for 25 years or five years after the death of Henry A. Kissinger, whichever is later, with unrestricted use only by Henry A. Kissinger and persons named or approved by him (see Exhibit 7).

6. On or about December 28, 1976, defendant Kissinger physically placed the records in the Library of Congress pursuant to the purported donation described in paragraph 5 (see Exhibit 8).

7. On January 4, 1977, defendant James B. Rhoads, Archivist of the United States, requested access to the records to determine whether they are in whole or in part records within the meaning of applicable laws and regulations (Exhibit 8). On January 18, 1977, defendants Department of State and Kissinger denied the request (Exhibit 9).

8. On February 11, 1977, the Archivist repeated his request (Exhibit 10).

9. The Archivist relied on an opinion by the General Counsel of the General Services Administration (Exhibit

11) which concluded that:

> The Archivist of the United States has the authority and responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in those positions.

10. On January 19, 1977, the Congressional Research Service of the Library of Congress, under the supervision of defendant Boorstin, Librarian of Congress, rendered an opinion (Exhibit 12) that since the recorded conversations were conducted by defendant Kissinger as "part of the official duties of the Secretary of State [,] [t]he transcripts of those conversations would therefore relate to the Secretary's public rather than private capacity," that such materials "are the public property of the United States rather than the personal property of the official" and therefore that "ownership of the secretarial transcripts in question is vested in the United States Government rather than Secretary Kissinger" (*id.* 5-6).

11. The opinion of the Congressional Research Service was based on a written opinion of defendant Department of State that monitoring of telephone conversations is prohibited except when "deemed absolutely essential to the conduct of business," as provided in Federal Property Management Regulations (FPMR 101-35.308) (Exhibit 13).

12. On January 24, 1977, defendant Department of State forbade all officers and employees to monitor or record telephone conversations except with the express consent of the Secretary of State or his Deputy (Exhibit 14).

Respectfully submitted,

/s/ William A. Dobrovir
WILLIAM A. DOBROVIR
ANDRA N. OAKES
DAVID L. SCULL
2005 L Street, N.W.
Washington, D.C. 20036

April 14, 1977

Attorneys for Plaintiffs

EXHIBIT 1

WILLIAM A. DOBROVIR/ANDRA N. OAKES
JOSEPH D. GEBHARDT/DAVID L. SCULL
2005 L Street, N.W. Washington, D.C. 20036
(202) 785-8919

December 28, 1976

BY HAND

Barbra Ennis, Director
Freedom of Information Staff
Room 2811
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Ms. Ennis:

On behalf of Military Audit Project (MAP) and Felice D. Cohen, Director of MAP, we request access, for the purpose of reading of written documents and listening to tape or other sound recordings, and for copying of those we may select after inspection, to the following records presently physically located in or in the custody of the Department of State:

All memoranda, aide memoirs, memoranda of conversations, secretarial notes, voice recordings or other written or recorded records of all conversations between Henry A. Kissinger and:

(1) the head of state or head of government of any foreign nation;

(2) the ambassador to the United States from any foreign nation;

(3) the foreign minister or foreign secretary, the national security advisor or any other official of

any foreign nation with responsibility for the foreign affairs, foreign relations or security of such nation.

This request includes all such records, whether or not purportedly designated as "personal" pursuant to §§ 417.1 or 432 of the State Department Manual; see GSA Bulletin FPMR B-65, 41 Fed. Reg. 51149 (November 19, 1976).

We further request that, until administrative consideration (and, if necessary, court proceedings) respecting this request are concluded, the records in question remain in the Department of State and not be removed therefrom. If this request is not to be honored, we request immediate notification thereof. We expect a reply within 10 working days, i.e., no later than the close of business, Wednesday, January 12, 1977.

Very truly yours,

/s/ William A. Dobrovir
William A. Dobrovir
Attorney for Military Audit
Project and Felice D. Cohen

WAD:crk

cc: Hon. Henry A. Kissinger
Secretary of State

Monroe Leigh, Esq.
Legal Adviser

EXHIBIT 2

WILLIAM A. DOBROVIR/ANDRA N. OAKES
JOSEPH D. GEBHARDT/DAVID L. SCULL

2005 L Street, N.W. Washington, D.C. 20036
(202) 785-8919

December 29, 1976

BY HAND

Barbra Ennis, Director
Freedom of Information Staff
Room 2811
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Ms. Ennis:

On behalf of Military Audit Project (MAP) and Felice D. Cohen, Director of MAP, we request access, for the purpose of reading of written documents and listening to tape or other sound recordings, and for copying of those we may select after inspection, to the following records presently physically located in or in the custody of the Department of State:

All memoranda, aide memoirs, memoranda of conversations, secretarial notes, voice recordings or other written or recorded records of all conversations between Henry A. Kissinger and any other person, conducted by Mr. Kissinger in his capacity as Secretary of State and in his capacity as National Security Adviser.

This request includes all such records, whether or not purportedly designated as "personal" pursuant to §§ 417.1 or 432 of the State Department Manual; see GSA Bulletin FPMR B-65, 41 Fed. Reg. 51149 (November 19, 1976).

We further request that, until administrative consideration (and, if necessary, court proceedings) respecting this request are concluded, the records in question remain in the Department of State and not be removed therefrom. If this request is not to be honored, we request immediate notification thereof. We expect a reply within 10 working days, i.e., no later than the close of business, Thursday, January 13, 1977.

Very truly yours,

/s/ William A. Dobrovir
William A. Dobrovir
Attorney for Military Audit
Project and Felice D. Cohen

WAD: crk
cc: Hon. Henry A. Kissinger
Monroe Leigh, Esq.

EXHIBIT 3

DEPARTMENT OF STATE
Washington, D.C. 20520

January 18, 1977

Mr. William A. Dobrovir
2005 L Street, Northwest
Washington, D.C.

Dear Mr. Dobrovir:

I refer to your requests of December 28 and 29 under the Freedom of Information Act for "all memoranda, aide memoirs, memoranda of conversations . . . or other written or recorded records of all conversations" between Henry A. Kissinger and certain enumerated classes of foreign officials (December 28 request) or between "Henry A. Kissinger and any other person conducted by Mr. Kissinger in his capacity as Secretary of State" and as National Security Adviser (December 29 request). Since any records encompassed by the December 28 request are necessarily covered by the December 29 request, we consider the former to be superseded by the latter.

As you may know, prior to the submission of either request, secretarial notes which constituted the Secretary's personal records of telephone conversations had been transferred to the Library of Congress. In addition, these notes themselves are not and have never been agency records of the Department of State. We have, however, carefully considered the remainder of your request. I must inform you that the Department of State cannot comply because your request is unreasonably broad and because it does not reasonably describe the records sought.

It is not possible within the available resources of this Department to process your request. Moreover, it is our

belief that it was not the intention of the Congress to require agencies to devote their resources to respond to sweeping, indiscriminate requests such as this and thereby subordinate the general public interest to one individual's desire to use a broad range of documents.

If you wish to appeal this denial to the Department's Council on Classification Policy, you may do so in accordance with the enclosed regulations.

Sincerely,

/s/ Monroe Leigh
Monroe Leigh
Legal Adviser

Enclosure:
22 CFR § 6.8

EXHIBIT 4

WILLIAM A. DOBROVIR/ANDRA N. OAKES/
JOSEPH D. GEBHARDT/DAVID L. SCULL
2005 I. Street, N.W. Washington, D.C. 20036
(202) 785-8919

January 24, 1977

Ambassador John E. Reinhardt
Assistant Secretary of State
for Public Affairs
Chairman, Council on Classification
Policy
Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Re: FOIA Request of
Military Audit Project

Dear Assistant Secretary Reinhardt:

This is an appeal from the denial, dated January 18, 1977, of two Freedom of Information Act requests: (a) a request of December 28, 1976, and (b) a request of December 29, 1976. Copies of all three are attached. The January 18, 1977, denial signed by then Legal Adviser Monroe Leigh, received by us on January 22, 1977, denied both our December 28, 1976, request for the records of specific conversations of then Secretary of State Kissinger with certain specifically described foreign government officials, and our December 29, 1976, request for records of all his conversations.

The January 18 denial states that "secretarial notes which constituted the Secretary's personal records of telephone conversations had been transferred to the Library of Congress." We are also aware that at former Secretary Kissinger's instance, Mr. Leigh in November 1976 gave him a written legal opinion that these conversations were his personal property.

Accordingly, it is obvious that the Leigh letter's assertion that our request does not reasonably describe the records in question was not made in good faith. They were sufficiently described to be the subject of his legal opinion; they were sufficiently described to be carted off first to the private property of former Vice President Rockefeller and then to the Library of Congress. Finally, the letter improperly and wrongly asserts that the first, specific request was superseded by the second, broader request.

The essence of the denial, however, is that, by reason of Mr. Leigh's November 1976 opinion that the records of the Secretary of State's conversations are "personal," they "are not and have never been agency records of the Department of State." We submit that it was highly improper for the Secretary of State to ask for a legal opinion from the Legal Adviser of the Department which was worth a great deal of money to the Secretary (by reason of Mr. Kissinger's desired exclusive access to the records for the purpose of writing his memoirs); still more improper for the Legal Adviser to give such an opinion, and still more improper for the same Legal Adviser then to rule on a Freedom of Information request for the same records.

We further submit that the records are records of the Department of State, an agency of the United States within the meaning of 5 U.S.C. § 552, and of 18 U.S.C. § 641 and 44 U.S.C. §§ 3101-07, 3301-14, as implemented in regulations of the Department of State, §§ 411, 412, 417, 423, 432 and 436 of the Foreign Affairs Manual and regulations of the General Services Administration, GSA

Buleltin FPMR B-65, ¶ 4(c), 41 Fed. Reg. 51149 (November 19, 1976).

For the foregoing reasons, we appeal the denial of:

(a) our request for records of conversations of former Secretary Kissinger with certain specifically described foreign officials, dated December 28, 1976; and

(b) our request for records of all of former Secretary Kissinger's conversations, dated December 29, 1976.

You are expressly informed that the December 29, 1976, request does not supersede the December 28, 1976, request; we appeal the denial of each request separately.

Moreover, we request that as lawful custodian of the records, the Department immediately take all steps necessary, including a civil suit for conversion or requesting criminal prosecution under 18 U.S.C. § 641 if necessary, to have the records which were removed from the Department by former Secretary Kissinger immediately returned to the Department so that they can be made available to us pursuant to the Freedom of Information Act.

We request a reply within 20 working days, or no later than February 22, 1977.

Very truly yours,

/s/ William A. Dobrovir
William A. Dobrovir

cc: Hon. Cyrus Vance, Secretary of State
Hon. Matthew Nimetz, Counselor of the Department of State
George H. Aldrich, Esq., Acting Legal Adviser

EXHIBIT 5

DEPARTMENT OF STATE
Washington, D.C. 20520

March 4, 1977

William A. Dobrovir, Esq.
William A. Dobrovir, Andra N. Oakes,
Joseph D. Gebhardt, David L. Scull
2005 L Street, N.W.
Washington, D.C. 20036

Dear Mr. Dobrovir:

This is in response to your letter of January 24, in which you appeal the Department's denial of requests you have made under the Freedom of Information Act.

Your original request, dated December 28, 1976, asked for "all memoranda, aide memoires, memoranda of conversations, secretarial notes, voice recordings or other written or recorded records of all conversations between Henry A. Kissinger and [three categories of foreign officials]." By a second request dated December 29, 1976, you asked for the same categories of materials relating to conversations between Henry A. Kissinger "and any other person." Both requests were denied by a letter of the former Legal Adviser, dated January 18, 1977.

Having reviewed the initial denial and your request for an appeal, the Department has decided to reaffirm the initial decision to deny your requests. Specifically, the Department has taken into account the following considerations:

There are in essence two aspects to your requests. The first aspect pertains to the secretarial notes of telephone conversations of former Secretary of State Kissinger which were donated by the former Secretary to the Library of Congress. The status of those notes is currently the subject of litigation: *The Reporters Committee for Freedom of the*

Press, et al v. Vance, et al, D.D.C. No. 77-0220 (filed February 8, 1977). Under these circumstances, the Department is not in a position to accede to this aspect of your request.

The second aspect pertains to documents which the Department does have in its possession. It would extend, however, to every piece of paper and all materials that reflect any conversations of the former Secretary of State. The request apparently includes aide memoires, diplomatic notes, memoranda of meetings, memoranda of telephone conversations, and correspondence between the former Secretary and persons both within and without the Department of State — a very large and undifferentiated volume of material. In the Department's view, this portion of your request is unreasonably broad, and does not in the terms of the Act reasonably describe documents properly subject to a Freedom of Information Act request.

In sum, the Department has reviewed its initial denial of your requests, but again concludes that it cannot accede to those requests. As you will be aware, you may seek judicial review of this decision.

Sincerely,

/s/ William D. Blair, Jr.
William D. Blair, Jr.
Acting Chairman
Council on Classification Policy

EXHIBIT 6

DEPARTMENT OF STATE
LEGAL ADVISER
WASHINGTON

November 11, 1976

Limited Official Use

MEMORANDUM TO THE SECRETARY

Legal Status of Transcribed Notes
of Your Telephone Conversations

In light of today's story in the *Washington Post* (copy attached), I thought it would be useful if I summarized the advice and opinions I have given over the last eleven months on the question of whether the transcribed secretarial notes of your telephone conversations should be considered as the records of any government agency, or as essentially personal papers that you are entitled to retain when you leave office.

The question first arose last January, when a request was filed under the Freedom of Information Act for some of these papers. At that time, I expressed my opinion that these papers were not "agency records" within the meaning of the Freedom of Information Act. Instead, they had consistently been treated as personal in nature, and there were rights of privacy at issue if telephone conversations between two people had to be disclosed to third parties or to the public. For these reasons, I was of the opinion that these papers were personal rather than agency records.

In February, I raised the Freedom of Information Act questions with the Assistant Attorney General for the

Decontrolled under
5 FAM 900 et seq.
12/22/76 *MS*

Office of Legal Counsel at the Department of Justice. He concurred in my view that the pending Freedom of Information Act requests for the transcribed notes of your telephone conversations could properly be denied on the basis that they were not agency records.

Finally in March, I was called upon to review an appeal of the Department's denial of the initial Freedom of Information Act request for these papers. I advised the Department's Council on Classification Policy that there was "very strong support" for concluding that these papers are not agency records. Incidentally, I gave this advice despite an assumption that some of the transcriptions contained classified material. The Council on Classification Policy reviewed the requested papers and found that they did *not* contain classified information.

Independently of these formal occasions when my legal opinion was sought by bureaus of the Department, I have on several occasions discussed with you my view that you would be entitled to retain the transcribed notes of your telephone conversations when you leave office. The detailed basis for my opinion is the following:

1. The papers have been expressly designated and filed as personal from the time they were originated. Under Department of State regulations (5 FAM 417.1a), a retiring official may retain papers expressly designated or filed as personal from their time of origin or receipt.

2. The papers have not been circulated within any agency, but have been continuously held in your possession and in that of your immediate assistants. They were retained solely at your discretion as work aids to help you recall prior conversations and events. Recent authority support the view that such papers are personal rather than agency records. In *Porter County Chapter* v. *A.E.C.*, 380 F. Supp. 630 (N.D. Ind. 1974), certain handwritten notes and materials of A.E.C. staff members were sought under the Freedom of

Information Act. The Court concluded that since "such materials [were] not circulated to nor used by anyone other than the authors, and [were] discarded or retained at the author's sole discretion for their own individual purposes in their own files," the materials were "personal notes and not agency records." *Id.* at 633. The OMB guidelines on the Privacy Act are in accord. They state that the Privacy Act extends only to records under the control of an agency and not to "uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion" — even if such materials are "in the possession of agency employees and used by them in performing official functions." 40 F.R. 28952 (1975).

3. The transcriptions that I reviewed in connection with the Freedom of Information Act requests did not contain any government decisions or policy actions. In the event that other transcriptions should reflect such decisions or actions, it is highly probable that they would have been incorporated in other papers at the time the decisions were implemented — and those latter papers would certainly have become government records. Nevertheless, as a precaution, you should review the papers. If any discussion of a significant government activity or decision is found, an extract or summary of it should be prepared and submitted to the appropriate records officials. This procedure is contemplated in the Department's regulations (5 FAM 432). Although technically these regulations apply only to "personal correspondence" and not to transcribed secretarial notes, the preparation of a summary or extract will assure that government records are complete.

4. There are expectations of privacy when two people have a telephone conversation. Although either party could well make a record of a conversation, one assumes that what was said will be revealed to others only at the discretion of the other party. Treating what was said as a

government or public record would violate these expectations.

5. The fact that the papers were retained for personal use, that they were not required to be prepared, that they have been consistently treated as personal, and that they contain personal and private matter, support the view that they are personal in nature. Similar factors were relied on in *United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), on reaching a conclusion that private notes made on an official government expedition (the Lewis and Clark expedition) were personal papers and not government property of the United States.

6. The fact that these transcriptions were prepared by government-paid secretaries using government paper and typewriters is not, in my opinion, controlling, in view of the factors discussed in paragraphs 1 through 5 above. Moreover, it is accepted practice that senior officials who must devote extraordinary amounts of time to government duties may make use of government office resources to prepare private correspondence and other personal materials.

7. Whether future judicial decisions concerning the Nixon papers might have some effect on the notes of your telephone conversations cannot yet be determined. But I am of the view that the Presidential Recordings and Materials Preservation Act of 1974 does *not* apply to these transcribed notes because that statute on its fact applies to "the Presidential historical materials of Richard M. Nixon" and not to personal papers of individuals who served under him.

Today's article in the *Washington Post* suggests that a "U.S. court restraining order" in the Nixon papers litigation may apply to the transcribed notes of your telephone conversations. That court order, however, expressly applies only to "defendants" in that litigation and

"their superiors, agents and assigns." *Nixon* v. *Administrator of General Services*, 408 F. Supp. 321, 375 (D.D.C. 1976). Since you do not come within any of these categories, this court order does not apply to the transcribed notes of your telephone conversations.

In summary, it is my opinion that under Department of State regulations and other legal criteria, these particular papers are personal and may be retained by you when you leave office.

Monroe Leigh

[Attachment]

Kissinger Hints He's Ready for Talks on His Future

By Don Oberdorfer
Washington Post Staff Writer

One of the world's hot literary properties — Henry A. Kissinger — passed the word yesterday that he plans to meet with "a few people" in the coming weeks about his work after leaving public office.

This announcement, from spokesman Robert L. Funseth, superseded an earlier statement from the Secretary of State that he would consider it "improper" to discuss financial offers while still in government.

Nobody would identify the persons who Kissinger plans to meet about his future. However, friends said Kissinger expects to write a book within the next two or three years, and is exploring a quasi-independent role as an adviser and consultant, possibly combined with an academic appointment.

Kissinger may well go onto corporate boards of directors, according to one friend, but will definitely not take a government post. Those familiar with his thinking said there is

little chance he will accept reported offers to be a television commentator, considering such a post to be beneath the dignity of a former diplomatic wizard.

Former Under Secretary of State Carlyle E. Maw, who was Kissinger's personal lawyer before joining the government, said yesterday he has been accepting "offers, suggestions and proposals" on behalf of Kissinger in recent weeks, but that Kissinger has not yet given them his attention.

Maw confirmed that he received a number of proposals for a book, which is expected to be one of Kissinger's major activities — and a major source of income — in the next several years. However, the lawyer said he had seen no outline and that he does not believe Kissinger has started drafting. Maw, who returned to private law practice last September, denied a published report that Kissinger has named a literary agent.

A New York literary source said the Kissinger memoirs were considered to have potential as "a very big book of our time," though nobody knows what Kissinger would cover in his writings, or how frank or incisive he would be. This source said publishing houses have submitted offers over many months, with no response from agents of Kissinger except to receive the offers.

European publishers are said to be particularly enthusiastic about a Kissinger memoir. A rumor, subsequently denied, swept European literary circles last week that the book was to be put up for auction in London within a few days.

Because of Kissinger's extraordinary importance in the history of the present era and his highly personalized and secretive methods of operation, his files and recollections may be of great importance to his successors in government as well as extremely valuable to historians and the public.

Lawrence S. Eagleburger, Kissinger's executive secretary, said yesterday that the originals of Kissinger's government papers will rest in the files of the State Department or, in the case of papers generated during his tenure as presidential national security affairs assistant, in the White House. As with other retired secretaries of state, access to his State Department documents after his departure from government will be arranged, Eagleburger said.

Eagleburger said extensive "memoranda of conversations" covering talks between Kissinger and foreign and U.S. leaders are part of this official file.

However, he said Kissinger obtained a State Department legal adviser's ruling last January that secretarial notes of his telephone conversations are "personal papers" which may be taken with him when he leaves government.

Some of Kissinger's most important transactions with presidents and foreign leaders are believed to have taken place by telephone. Some private attorneys believe the records of telephone conversations monitored during the Nixon presidency may be covered by the U.S. court restraining order which requires public preservation of the Nixon papers.

According to State Department regulations, no papers which have not been explicitly designated or filed as personal at the time of origin or receipt may be removed when an official resigns.

The line between official records and personal papers is the subject of a memo, awaiting final clearance, which the National Archives and Records Service plans to send within a few days to all government departments.

Rep. Bella Abzug (D—N.Y.) chairman of the subcommittee on government information of the House Government Operations Committee, is reported to be considering

an appeal to have a moratorium on the removal of any papers by departing Ford administration officials until the ownership questions can be resolved and the removal of documents supervised by the National Archives and the subcommittee.

Eagleburger said yesterday he expects Kissinger to be "very conservative" in determining what might be of a personal nature. "If there is a question about it, it will stay here," Eagleburger said.

In all of his dealings with senior Chinese officials in Peking and some of his dealings with Soviet diplomats, Kissinger has departed from the traditional practice of utilizing his own interpreter, relying instead exclusively on interpreters supplied by the other sides. There have been reports that this was done by Kissinger for purposes of keeping dealings secret from the U.S. government bureaucracy and that no other U.S. official could be sure of what was said in some extremely important meetings.

Eagleburger quoted Kissinger yesterday as saying there was always a U.S. note-taker during his Chinese and Soviet conversations. Eagleburger said the use of Chinese rather than American interpreters in Peking was at Chinese insistence.

EXHIBIT 9

THE SECRETARY OF STATE
WASHINGTON

January 18, 1977

Dear Dr. Rhoads:

I write in response to your letter of January 4, in which you inquire about the donation of my papers to the United States for preservation at the Library of Congress and, in particular, about that portion of the donation that comprises the secretarial notes of my telephone conversations.

Apparently, there has been some misunderstanding or at least incomplete information concerning this donation. So that you may be apprised of what has occurred, I enclose a copy of a letter I have sent to the Chairman of the House Committee on Government Operations, which describes in detail the scope of the donation and the steps taken to assure completeness of Department of State records.

I also enclose a copy of a memorandum by counsel to the Department, which discusses several problem areas that might arise if the additional procedures contemplated in your letter were followed. With respect to the procedures which have been followed to date, I have requested the records officers of the Department to answer any further questions you may have concerning the steps taken.

Best Regards,

/s/ Henry A. Kissinger
Henry A. Kissinger

Enclosures:
as stated above

Dr. James B. Rhoads,
Archivist of the United States,
National Archives and Records Service.

THE SECRETARY OF STATE
WASHINGTON

Dear Mr. Chairman:

I write in response to your letters of January 3 and January 11, concerning the donation of my papers to the United States for preservation at the Library of Congress.

In confirmation of your conversation with the Deputy Under Secretary of State, Mr. Lawrence Eagleburger, I wish to reiterate the following details concerning the scope of the donation and the steps undertaken to assure the completeness of Department of State records.

First, all government papers that have been donated to the Library of Congress are copies and *not* original records. Documents officers have carefully reviewed all of these papers to make certain that all original or record copies are included in the appropriate files at either the Department of State, National Security Council, or White House, and that only copies have been included in the files that have been transferred to the Library.

Second, in addition to government papers, I have donated papers relating to my personal life, both before and during my years of government service. This portion of the donation includes, for example, papers from my years at Harvard University.

Third, I have donated under a separate instrument, the secretarial notes of my telephone conversations. These papers have been consistently treated as personal work aids. The special privacy considerations raised by these

The Honorable
Jack Brooks,
Chairman,
Committee on Government Operations,
House of Representatives.

notes are reflected in the separate instrument of gift. Counsel to the Department of State has thoroughly reviewed the applicability of Department of State regulations to these papers, and has advised that under these regulations and other legal authority, the papers are personal. The only copies of these papers are at the Library of Congress.

However, also pursuant to Department of State regulations, Deputy Under Secretary Eagleburger is at my direction reviewing these notes of telephone conversations and is extracting any significant government activity or decision that may be reflected in them. These extracts will be forwarded to the appropriate government offices or agencies for inclusion in government record files.

Both in executing and in implementing the donations to the Library of Congress, I have endeavored to follow in both letter and spirit the applicable Department of State regulations. I am advised that these regulations, which have been in effect since 1967 and which were promulgated pursuant to 44 U.S.C. 3101 and 3102, have been scrupulously followed with respect to my papers.

I wish to note that the Department's regulations serve a number of relevant policy considerations. They assure that the Department has continuing access to information needed for the conduct of foreign policy. They also respect privacy expectations in papers that have been consistently treated as personal. This aspect of the regulations has enabled numerous Department officials to originate candid diaries and notes which reflect their official activities and which have proved to be invaluable historical legacies. Although I am not in a position to make a similar claim for the minor portion of my papers that I have treated as personal, I am convinced that the policy reflected in the Department regulations of 1967 serves to promote candid accounts of government service which would not otherwise be created. Such accounts would certainly not be created if the accompanying privacy expectations did not continue to

be respected.

I wish to assure you, as I have assured others, that the Department of State will have complete records of the foreign policy actions and decisions in which I have participated as Secretary of State. With respect to the donations I have made, all of the papers in question are to be preserved for future scholars at an institution of unquestioned integrity, the Library of Congress. As you may know, the Library has preserved the papers of 27 other Secretaries of State. It is my sincere hope that when the donation is considered in this perspective, it will be viewed as a positive and responsible contribution.

Best regards,

Henry A. Kissinger

THE LEGAL ADVISER
DEPARTMENT OF STATE
Washington

January 14, 1977

MEMORANDUM

By a letter dated January 4, 1977 to Secretary of State Kissinger, the Archivist of the United States has inquired about Secretary Kissinger's donation of papers to the Library of Congress, and, in particular, about that portion of the donation consisting of secretarial notes of Secretary Kissinger's telephone conversations. The letter requests that GSA archivists be permitted to review these notes, so that they might make their personal assessments as to whether these notes consist of personal or agency records.

It appears that the request has not taken into account the following factors: (1) that the nature of the notes in question must, under present law, be determined according to the Department of State regulations; (2) that the Department's records interest is met by the "extract" requirement; (3) that the GSA is not an appropriate entity to review the notes, because of its advocate's interest in seeking a government-wide rule for distinguishing personal from official papers; (4) that other legal authority fully supports the policies reflected in the Department of State regulations; and (5) that Department policies would be prejudiced by the requested review. This memorandum discusses each of these points in detail.

1. Role of Department of State Regulations

Whether the notes in question are personal or official papers must, in the final analysis, be considered in light of the Federal Records Act, 44 U.S.C. 3101 *et. seq.*, and the Department of State regulations, promulgated under that Act. There is not under present law any carefully defined, government-wide legal standard for distinguishing personal from official papers. (Indeed the absence of such a government-wide standard is the reason why the present National Study Commission on Records and Documents of Federal Officials was created.) Instead, existing legislation leaves it to each federal agency to determine how records should be made and preserved, and to provide for "effective controls over the creation, maintenance and use of records." 44 U.S.C. 3101 and 3102.

Pursuant to this statutory authority, the Department of State in 1967 promulgated regulations concerning maintenance of records and, in particular, concerning what papers a retiring official may retain as personal. 5 FAM 417.1 and 432. Inasmuch as these Department regulations are controlling, it is the responsibility of Department of State officers, and not GSA archivists, to ascertain what steps are being taken to assure continuing Department access to information which may be reflected in the notes in question and which might be needed for the conduct of foreign policy.

2. The "Extract" Requirement

The Department's regulations establish a pragmatic test for determining what papers a retiring official may retain as personal. If a paper has been explicitly designated or filed as personal from the time of origin or receipt, it is considered to be personal and may be retained; on the other hand, if a paper has not been so designated or filed, or if it has been circulated within the agency, it is considered to be an agency record. 5 FAM 417.1. This working test for distinguishing personal from official papers attempts to respect, in a realistic fashion, privacy expectations that an individual Department employee or official may have with respect to a paper.

However, even though a paper may be considered personal, official policy matters discussed in such a paper must be extracted and forwarded for inclusion in Department records.

5 FAM 432. The Department has consistently construed this provision as requiring a departing official to extract any significant government activity or decision that may be reflected in such a paper. (Note that the very existence of an extract requirement is based on the premise that there are categories of personal papers which may and do contain discussions of official activities and that such discussions of official activities do not alter the personal nature of these papers.)

At present, the secretarial notes of Secretary Kissinger's telephone conversations are being reviewed at his direction, in order to ascertain which portions of them must be extracted for inclusion in appropriate foreign policy record files. In light of this review, it would be highly unusual if these same papers were to be subjected to a second review by persons unfamiliar with the current state of foreign policy. We would, of course, anticipate that in future years, when foreign policy records are normally reviewed within the State Department to determine whether they should be transferred and preserved at the National Archives, these extracts will also be reviewed for that purpose.

It should be noted that no statute required Secretary Kissinger to make and retain candid notes of telephone conversations. The only requirement is that significant government activities or decisions undertaken by a Secretary of State by telephone be reflected in government records. This requirement is being fully satisfied, so that the agencies of the United States Government concerned with the conduct of foreign policy will have the information needed for the conduct of foreign policy in coming years. Also, in the event that some of these extracts may pertain directly to the Nixon or Ford Presidencies (as opposed to National Security Council or Department of State business), they are to be forwarded for inclusion in the White House files for those periods.

3. GSA's Advocate's Interest

Recently, the GSA has espoused a view that personal papers are limited to material pertaining solely to an individual's private affairs, and not at all to his official activities. This view implies that traditionally personal materials (like diaries, notes and family correspondence) which discuss a person's official activities, are official records. The GSA advocated this position in proposed regulations under the Presidential Recordings and Materials Preservation Act, but it was expressly rejected twice by the Congress in the past year. S. Res. 428; H. Res. 1505; see H. Rep. No. 94-1485 of 4-5 (1976). This approach, among others, has also been suggested to the National Study Commission on Records and Documents of Federal Officials, which has the task of proposing for the first time, government-wide legislation on the personal-official paper distinction. In that forum, GSA is a proponent for a definition of official records that is inconsistent with Department of State regulations. In view of this advocate's interest, it would not seem appropriate for GSA archivists to preempt the Department of State by reviewing the notes in question.

We, of course, are aware of the recent GSA Bulletin FPMR B-65 (November 15, 1976), which undertakes to summarize existing law with respect to records. Significantly, the only paragraph in that "summary" that is not supported by a statutory citation is paragraph 3c, which advances the GSA's recent proposal on the distinction between official and private papers. In this regard, no provision of the GSA Federal Property Management Regulations of February 1967 contains so far-reaching a definition of official records as that contained in paragraph 3c of GSA Bulletin FPMR B-65.

4. Other Legal Authority

Recent judicial decisions have firmly supported the view, embodied in Department of State regulations, that per-

sonal papers can include discussions of official activities, *United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), and that such personal records of official activity are not agency records, *Porter County Chapter v. A.E.C.*, 380 F. Supp. 630 (N.D. Ind. 1974). The same conclusion is set forth in the OMB Guidelines to the Privacy Act (40 F.R. 28952), which makes clear that "agency records" do not include "uncirculated personal notes, papers and records" — even if such materials are "in possession of agency employees and used by them in performing official functions."

Also, in the last government-wide pronouncement on what papers a retiring official may retain — Cabinet Paper CP-59-58-4, July 27, 1959 — it states that "since such work-aids as office diaries, logs, memoranda of conferences and telephone calls are usually reflected in actual agency records, such work-aids ordinarily can be removed."

In a related context, the Department last January received a Freedom of Information Act request relating to some of the notes in question. Before responding to the request, we consulted with the Office of Legal Counsel at the Department of Justice, which orally concurred in our position that the notes sought were not agency records subject to the Freedom of Information Act. Attached for reference is a recent Department of Justice press guidance concerning these events. I call attention to the conclusion that one of the grounds for denying the request "was that the request included documents which were not 'agency records' within the meaning of the Freedom of Information Act, 5 U.S.C. §552, but rather personal notes and records of Mr. Kissinger."

5. Prejudice to Department Interests

The Department of State regulations serve a number of important policy interests — in particular, access by the Department to full information needed for the conduct of foreign policy, and respect for privacy expectations which an individual may have in regard to a paper that has been

consistently treated as personal. It should be noted that the respect for privacy expectations implicit in the Department's regulations has enabled numerous Department officials to originate candid diaries and notes which have proved to be invaluable historical resources.

If present practices were changed so as to preclude an official's private papers from containing material concerning his conduct in office, these candid and intimate sources of history would not be created. And, of equal concern to the Department, matters that are currently set down on paper might cease to be recorded.

In summary, it is my view that the procedure contemplated in the Archivist's letter of January 4 would present a number of difficulties for the Department and the administration of its records policies.

/s/ Monroe Leigh
Monroe Leigh

Department of Justice Press Guidance (12/23/76):

The Department of Justice has received requests for copies of a formal legal opinion thought to have been issued by the Department concerning the ownership of secretarial notes of telephone conversations of Secretary of State Kissinger. No such opinion exists. Early this year, however, in accordance with normal practice, the Office of Legal Counsel of the Department was consulted informally with respect to the proposed denial of a Freedom of Information Act request which sought such material relating to certain of Mr. Kissinger's telephone conversations. On the basis of a general description of the material involved which included both transcribed and untranscribed notes, the Assistant Attorney General for the Office of Legal Counsel orally approved the propriety of denying the request on several grounds, one of which was that the request included documents which were not "agency records" within the meaning of the Freedom of Information Act, 5 U.S.C. §552, but rather personal notes and records of Mr. Kissinger.

EXHIBIT 10

Feb 11 1977

Honorable Henry A. Kissinger
1800 K Street, NW.
Washington, D.C. 20006

Dear Dr. Kissinger:

This is in reply to your letter of January 18.

In that letter you declined to permit professional archivists from the staff of the National Archives and Records Service to examine the transcripts or notes of telephone conversations which you have deposited with the Library of Congress. You included with your reply copies of your letter to the Honorable Jack Brooks, Chairman of the House Committee on Government Operations, and a January 14 legal memorandum from the Legal Adviser to the Department of State, Mr. Monroe Leigh.

While those enclosures add some information regarding the deposit of this material with the Library of Congress, they do not resolve the basic issue of whether some or all of the transcripts or notes are Federal records, Nixon historical materials, or personal papers.

Consequently, I am writing to you once again to enlist your cooperation in making it possible for qualified archivists from my staff to examine this material in order to make the necessary determinations. As I indicated in my letter of January 4, this work would be done by professional archivists who will protect any confidential information they may encounter. It is my intent to select for this purpose a small team of archivists experienced in diplomatic records, personal papers, and the appraisal of Federal records.

With regard to the legal issues involved and Mr. Leigh's memorandum, I enclose the opinion of the General Counsel of the General Services Administration. As you will

note, this opinion concludes that: "The Archivist of the United States has the authority and responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by Former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in those positions."

In view of this opinion and in order to resolve the basic issue expeditiously, I would appreciate it if you would make the necessary arrangements with the Librarian of Congress so that the members of my staff may have access to the materials in question.

Sincerely,

/s/ James B. Rhoads
JAMES B. RHOADS
Archivist of the United States

Enclosure

EXHIBIT 11

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

Date: Feb 03 1977 *Officer of General Counsel*
Reply to *Washington, D.C. 20405*
Attn of: General Counsel — L

SUBJECT: Archival inspection of Kissinger telephone transcripts and related documents

TO: James B. Rhoads
Archivist of the United States — N

Pursuant to your request, this office has examined the legal questions posed by your request to the Honorable Henry A. Kissinger, former Secretary of State and Assistant to the President for National Security Affairs, that a team of archivists be permitted to inspect certain telephone transcripts and related documents, the former constituting the corpus of the most recent donation by Dr. Kissinger to the Library of Congress. In examining these questions, we have paid particular attention to the memorandum of law dated January 14, 1977, of then Department of State Legal Adviser Monroe Leigh, which was an enclosure to Dr. Kissinger's letter to you of January 18, in which he rejected your request for archival inspection.

FACTS

Recent news accounts, which have been confirmed by subsequent events, disclosed that former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger had his secretary transcribe certain of his telephone conversations that had taken place during the course of his service in these positions. These accounts further disclosed that Dr. Kissinger had concluded that these transcripts were his personal property and, accordingly,

that he could dispose of all or part of them as he chose to do. On December 24, 1976, Dr. Kissinger donated the only copy of these transcripts to the Library of Congress, pursuant to an instrument accepted by the Library which provides for lengthy and frequently indefinite periods of restricted access. Concerned that all or part of the transcripts might be federal records or Nixon historical materials rather than personal papers, you wrote to Dr. Kissinger on January 4, 1977, and requested that he permit a team of experienced archivists to inspect them and related documents, and subsequently issue a report to him on your findings. By a letter to you dated January 18, Dr. Kissinger, enclosing undated correspondence with the Honorable Jack Brooks, Chairman, House Committee on Government Operations, and a memorandum of law dated January 14, of then Department of State Legal Adviser Monroe Leigh, rejected your request for archival inspection of the transcripts and related documents. In his letter to Chairman Brooks, Dr. Kissinger stated that he had assigned then Deputy Under Secretary of State Eagleburger the task of making extracts of those portions of the transcripts which reflect "significant government activity or decision . . . . These extracts will be forwarded to the appropriate government offices or agencies for inclusion in government record files."

ISSUES

Does the Archivist of the United States have the authority and responsibility to make an independent determination of what documentary materials created or received by a cabinet officer in the course of his service in that capacity are federal records as defined in the Federal Records Act (44 U.S.C. 2101 *et seq.*)?

Does the Archivist of the United States have the authority and responsibility to make an independent determination of what documentary materials created or received by a

White House adviser to former President Nixon in the course of his service in that capacity are Presidential historical materials of the Nixon Administration as defined in Title I of the Presidential Recordings and Materials Preservation Act (P.L. 93-526; 88 Stat. 1695; 44 U.S.C. 2107 note), as implemented by the proposed public access regulations of the Administrator of General Services (40 CFR, Part 105-63)?

CONCLUSION

The Archivist of the United States has the authority and responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in those positions.

DISCUSSION

I. There is one glaring oversight in the memorandum of law which accompanied Dr. Kissinger's rejection of your request for archival inspection of the telephone transcripts and related documents. It totally ignores any examination of the statutory and regulatory authorities and responsibilities of the Administrator of General Services, as delegated to the Archivist of the United States, which flow from the Federal Records Act and Presidential Recordings and Materials Preservation Act. Instead, the memorandum confines its examination of pertinent statutes and regulations to only that portion of the Federal Records Act which relates to the records management responsibilities of agency heads, as implemented by State Department regulations. (Throughout the entire memorandum there is no reference or discussion of Title I of the Presidential Recordings and Materials Preservation Act; hence, there is no consideration whatsoever of Nixon historical materials.)

Viewed in this limited perspective, the memorandum concludes that the responsibility for determining the character of the transcripts rests solely with the agency head, i.e., Dr. Kissinger. The heart of Mr. Leigh's rationale is expounded in one of his initial paragraphs:

> Whether the notes in question are personal or official papers must, in the final analysis, be considered in light of the Federal Records Act, 44 U.S.C. 3101 *et seq.*, and the Department of State regulations, promulgated under that Act. There is not under present law any carefully defined, government-wide legal standard for distinguishing personal from official papers. (Indeed the absence of such a government-wide standard is the reason why the present National Study Commission on Records and Documents of Federal Officials was created.) Instead, existing legislation leaves it to each federal agency to determine how records should be made and preserved, and to provide for "effective controls over the creation, maintenance and use of records." 44 U.S.C. 3101 and 3102.

Each of the sentences in this "definitive" paragraph contains a statement that is either erroneous or incomplete, or both. The first sentence implies that chapter 31 of title 44, United States Code, "Records Management by Federal Agencies", contains standards by which an agency head is instructed on making determinations of what documentary materials constitute federal records. To the contrary, there is no section of chapter 31 that provides this guidance. Indeed, the emphasis of the chapter reflects the oversight function of GSA and supports your request for archival inspection of the transcripts. For example:

> The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the

> records of the agency. The program, among other things, shall provide for . . . (2) *cooperation with the Administrator of General Services* in applying standards, procedures, and techniques designed to improve the management of records, *promote the maintenance and security of records deemed appropriate for preservation*, and facilitate the segregation and disposal of records of temporary value . . . .
>
> * * *
>
> The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary *and required by regulations of the Administrator of General Services.*
>
> * * *
>
> The head of each Federal agency *shall notify the Administrator of General Services* of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and *with the assistance of the Administrator* shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency . . . .
>
> (44 U.S.C. 3102, 3105 and 3106, respectively)
> [Emphasis added.]

These sections of chapter 31 make it quite clear that every agency head shall operate the agency's records management program in full cooperation with and under regulations prescribed by GSA. To dismiss the oversight authorities and responsibilities of the Administrator, as delegated to the Archivist, is to ignore the plain reading of even this particular chapter of title 44.

The second sentence of the subject paragraph, which states that there are no carefully defined, government-wide standards under present law to distinguish federal records from personal papers, is, in our view, wholly erroneous. While we assume Mr. Leigh would argue that present standards are not "carefully defined," we believe the current definition of federal records, considered by the Congress as recently as October 21, 1976, provides a great deal of insight on a complex subject:

> "[R]ecords" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included. (44 U.S.C. 3301)

While there is no definition of "personal papers" in the Federal Records Act, NARS has issued government-wide standards concerning their scope for over 10 years, and as recently as November 15, 1976. Quite logically, the definition of "personal papers" is derived from the converse of the definition of federal records:

> The definition of official records involves materials made or received either in pursuance of

> Federal law or in connection with the transaction of public business. The definition of personal papers covers material pertaining solely to an individual's private affairs. In other words, correspondence, designated "personal," "confidential," or "private," etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of Federal law pertinent to the maintenance and disposal of such records. Official records are public records and belong to the office rather than to the officer. (GSA Bulletin FPMR B-65, Para. 3(c), November 15, 1976)

Given a subject matter as complex as federal records, it would be foolish to suggest that every document created or received by a federal official falls neatly in one category or another. But it is the very existence of a "gray area" that argues so strongly for the input of professional archivists in the decision-making process. These archivists within NARS are the persons most experienced in applying the criteria (subject matter, adequacy of alternative documentation, circulation, etc.) necessary for making these determinations.

In addition to the standards pertinent to federal records, there are also standards pertinent to the Presidential historical materials of the Nixon Administration. This subject, while ignored in the Leigh memorandum, is most important to the proper disposition of those transcripts created in the course of Dr. Kissinger's service as Assistant to the President for National Security Affairs. Title I of the Presidential Recordings and Materials Preservation Act requires the Administrator of General Services to

> receive, retain, or make reasonable efforts to obtain complete possession and control of all papers, documents, memorandums, *transcripts*, and other objects and materials which constitute

the Presidential historical materials of Richard M. Nixon . . . .

The Administrator is further instructed to

> issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials . . . from loss or destruction . . . .
>
> (Sections 101(b)(1) and 103, respectively, of the Presidential Recordings and Materials Preservation Act, P.L. 93-526, 88 Stat. 1695, 44 U.S.C. 2107 note)
> [Emphasis added.]

Pursuant to this authority, GSA has proposed regulations which include definitions of Nixon "Presidential historical materials", which must remain in or be transferred to the custody and control of the Administrator, and "private or personal materials", which are to be returned to former President Nixon or the member of his staff having a proprietary interest in them.

> The term "Presidential historical materials" . . . shall mean all papers, correspondence, documents, pamphlets, books, photographs, films, motion pictures, sound and video recordings, machine-readable media, plats, maps, models, pictures, works of art, and other objects or materials made or received by former President Richard M. Nixon *or by members of his staff* in connection with his constitutional or statutory duties or political activities as President and retained or appropriate for retention as evidence of or information about these duties and activities. Excluded from this definition are documentary materials of any type that are determined to be the official records of an agency of the Government; private or personal materials; stocks of

> publications, processed documents, and stationery; and extra copies of documents produced only for convenience of reference, when they are clearly so identified.
>
> The term "private or personal materials" shall mean those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other non-public activities, including private political association, and having no connection with his constitutional or statutory duties or political activities as President *or as a member of the President's staff.*
>
> (41 CFR §105-63.104(a) and (b), respectively, as most recently transmitted to the Congress on April 13, 1976)
> [Emphasis added.]

It should be noted that elsewhere in Mr. Leigh's memorandum, where he states that GSA advocates too narrow a definition of personal materials, he cites the Congress' rejection of the latter definition as support for his contention. Contrary to his implication that the Congress does not support this narrow view of personal materials, the Congress has rejected this definition because it deems the proposed definition too broad. In particular, the House of Representatives has rejected the definition because of the inclusion of the phrase, "including private political association," in describing those materials which are private or personal.

The third sentence of the pertinent paragraph states that the Congress created the National Study Commission on Records and Documents of Federal Officials in an effort to clarify the definitions of official records and personal papers. This is a clear misstatement of the basic purpose of the so-called Public Documents Commission. As you are so

keenly aware, the Congress created the Commission in the aftermath of the "Nixon-Sampson Agreement", which concerned the ultimate disposition of the Presidential materials of the Nixon Administration, and had nothing to do with federal records. There is nothing in the language of Title II of the Presidential Recordings and Materials Preservation Act (44 U.S.C. 3315 *et seq.*) or its legislative history which focuses the Commission's attention to an overhaul of existing statutes which regulate access to and the disposition of federal records, notably the Federal Records Act, the Freedom of Information Act and the Privacy Act of 1974. While there is a great deal of law pertinent to the disposition of federal records, there is almost no law pertinent to the disposition of the papers of constitutional office-holders. The primary purpose of the Public Documents Commission is to examine this dearth of law and to make recommendations to the Congress on the scope of remedial legislation.

The final sentence of the subject paragraph reiterates the memorandum's conclusion that it is within the sole province of each agency "to determine how [its] records should be made and preserved." In addition to those sections of chapter 31 cited above, this analysis again ignores those other portions of the Federal Records Act which establish the oversight authority and responsibility of the Administrator, as delegated to the Archivist. For example:

> When the Administrator finds that a provision of chapter 21, 25, 27, 29, *or 31* of this title has been or is being violated, he shall inform in writing the head of the agency concerned of the violation and make recommendations for its correction. Unless corrective measures satisfactory to the Administrator are inaugurated within a reasonable time, the Administrator shall submit a written report of the matter to the President and the Congress.
> (44 U.S.C. 2111(b)) [Emphasis added.]

In the present instance you are aware of a possible violation falling within your area of responsibility. You have informed the agency head of your concern, and have recommended an archival inspection of the subject transcripts and related documents as a means of aiding in the resolution of the dispute. These actions are clearly within the purview of section 2111(b), quoted above. If you deem Dr. Kissinger's rejection of your request an unsatisfactory corrective measure, ultimately it is encumbent upon you to report thereon to the President and the Congress. In the interim, pursuant to section 3106 of title 44, quoted above, you might also refer the matter to the Attorney General for such action as he deems appropriate.

In like manner, section 2906 of title 44 authorizes the Administrator to "inspect the records or the records management practices and programs of any Federal agency" for the purpose of recommending improvements in those practices and programs. It is important to note that records management is elsewhere defined (44 U.S.C. 2901(2)) to include records disposition.

II. As an affirmative basis for the determination by Dr. Kissinger that the transcripts are personal, the Leigh memorandum cites a State Department records management regulation which provides a clear standard for distinguishing federal records from personal papers:

> The Department's regulations establish a pragmatic test for determining what papers a retiring official may retain as personal. If a paper has been explicitly designated or filed as personal from the time of origin or receipt, it is considered to be personal and may be retained; on the other hand, if a paper has not been so designated or filed, or if it has been circulated within the agen-

cy, it is considered to be an agency record.

This regulation is apparently derived from a provision of the Federal Property Management Regulations:

> Papers of a private or nonofficial character *which pertain only to an individual's personal affairs* that are kept in the office of a Federal official will be clearly designated by him as nonofficial and will at all times be filed separately from the official records of his office.
> (41 CFR §101-11.202-2(d)) [Emphasis added.]

The distinction between the internal State Department directive and the government-wide FPMR, which dates from February 1967, is striking. When the Leigh memorandum later states that your directive of November 15, 1976, is the first time NARS established "so far-reaching a definition of official records," the author apparently overlooked this precedent going back over 10 years.

Further, while the State Department regulation is certainly "pragmatic" to the extent it minimizes the "gray area", we suggest that, in limiting the applicable criteria to the document's designation, filing and/or circulation, it is invalid. Even though each of these criteria is important in determining the distinction between federal records and personal papers, a federal official may not conclusively establish a document as a personal paper, although its subject matter relates to official business, by merely designating it as personal, filing it separately, or withholding it from circulation. Were that the intent of Congress in enacting the Federal Records Act, the Freedom of Information Act, and related legislation, some of the most significant documents reflecting the conduct of public business would never be subject to public scrutiny.

The State Department regulations appear to recognize this discrepancy. As explained in the Leigh memorandum, the remedy is sought in an extraction requirement:

> However, even though a paper may be considered personal, official policy matters discussed in such a paper must be extracted and forwarded for inclusion in Department records. [Cite omitted.] The Department has consistently construed this provision as requiring a departing official to extract any significant government activity or decision that may be reflected in such a paper.

This particular regulation is apparently derived from a second proviso of FPMR 101-11.202-2(d):

> In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files . . . .

Again there is a clear distinction between the extraction standard established in the government-wide FPMR and that standard established internally at the State Department, at least as that regulation is interpreted by the Leigh memorandum. While the FPMR requires the extraction of "the portion . . . that pertains to official business," the State Department standard requires the extraction of only "any significant government activity or decision." Conceivably, in some instances an extraction performed under State Department standards may be synonymous with an extraction performed under FPMR standards. But at the same time it is reasonable to conclude that in many instances the extraction of information about "significant government activity or decision" will encompass less material than information "that pertains to official business." These differing standards highlight the rationale of archival review and oversight.

There is another significant aspect to the affirmative reliance on the State Department regulations in the Leigh memorandum. Inasmuch as these regulations are ap-

parently derivatives of the Federal Property Management Regulations, they represent the delegation of government-wide records management authority vested in the Administrator to the Secretary of State for purposes of managing State Department records. It is a maxim of the law of agency that the principal, i.e., the Administrator (or in this instance the Archivist), may revoke fully or partially the authorities delegated to the agent, i.e., the Secretary of State. Your request to Dr. Kissinger is consonant with this maxim.

III. The myriad quotations and citations of statutes and regulations make unequivocal the oversight authority and responsibility of the Administrator of General Services, as delegated to the Archivist of the United States, in resolving the questions which have arisen concerning the disposition of the Kissinger telephone transcripts. There are, however, certain other points raised in Mr. Leigh's memorandum which warrant our attention. First, on page 3 he states: "It should be noted that no statute required Secretary Kissinger to make and retain candid notes of telephone conversations." While we reserve judgment on the question of whether any statute requires their retention pending the resolution of their character, we call into question the significance of the fact that no statute mandated their creation. With rare exception, this is true of any particular documents we call federal records. The significance to the custodial agency and GSA is not that they didn't have to be created, but that they were created. Given the fact of their creation and existence, they may be disposed of only in accordance with applicable statute and regulation (44 U.S.C. 3314).

Second, the memorandum rejects GSA intervention because of a disqualifying advocate's interest in the ultimate resolution of the controversy. This is a patently absurd reason for rejecting your request. Your interest in the matter derives from your statutory authorities and responsibilities over the subject matter. That your conception of the scope of personal papers might differ from that of Dr. Kissinger has absolutely no bearing on your authority and responsibility to intervene.

Third, the memorandum cites an oral opinion of the Justice Department's Office of Legal Counsel that the transcripts in question are not federal records. In subsequent conversations between attorneys in this office and the officials in the Office of Legal Counsel who were instrumental in issuing that opinion, we have learned that the issue presented that office by the State Department concerned a Freedom of Information request for access to certain transcripts created by Dr. Kissinger in his capacity of Assistant to the President for National Security Affairs. Because the "White House Office" is specifically excluded from the definition of agencies subject to the FOIA, these transcripts were logically determined not to be records subject to the FOIA. Of course, such an opinion does not confront the issues of whether the transcripts created in the course of Dr. Kissinger's service in the Nixon White House are Nixon historical materials, or if the transcripts created in the course of his service as Secretary of State are federal records.

Finally, we touch on the question of the potential harm caused by archival examination of what are truly personal materials. While conceding the possibility of some invasion of the privacy of Dr. Kissinger or certain of the persons with whom he was speaking, we believe this threat is far outweighed by the public interest served by archival inspection. It is also noted that the instrument deeding these transcripts to the Library of Congress incorporates a provision for access to the transcripts by approved Library of Congress employees during their period of restriction. If these federal librarians or archivists can be so entrusted with access to the transcripts, we question the logic in the exclusion of archivists employed by NARS. To be sure, a

three-judge panel of the United States District Court for the District of Columbia has recently recognized the "unblemished record" of GSA archivists for protecting individual privacy while rejecting former President Nixon's contention that archival inspection of his materials will result in an unconstitutional invasion of his privacy. (*Nixon v. Administrator of General Services*, 408 F. Supp. 321, 365-67 (D.D.C. 1976), *probable jurisdiction noted*, Supreme Court of the United States (No. 75-1605, November 29, 1976)).

RECOMMENDATION

This office recommends that you renew your request for archival inspection of the transcripts and related documents to Dr. Kissinger, providing a copy of your request to the present Secretary of State. Should your request be rejected or go unanswered, we recommend consultation with appropriate officials of the Department of Justice in determining your next course of action.

/s/ Donald P. Young
DONALD P. YOUNG
General Counsel

EXHIBIT 12

THE LIBRARY OF CONGRESS
Congressional Research Service
Washington, D.C. 20540

January 19, 1977

TO: H. Subcommittee on Government Information, and Individual Rights

Attention: Timothy H. Ingram
Staff Director

FROM: American Law Division

SUBJECT: Public Ownership of Secretarial Telephone Transcripts of the Secretary of State

This memorandum is in response to your request for our legal opinion concerning the ownership of the secretarial transcripts of the telephone conversations of Dr. Henry A. Kissinger during his service from 1969 through 1977 as National Security Assistant to the President and as Secretary of State. Specifically, it is asked whether these documents are the personal property of Dr. Kissinger or the public property of the United States Government.

On December 28, 1976, the Secretary of State announced that the transcriptions would be donated to the Library of Congress under a separate deed of gift from that governing the remainder of his papers. In general, access to all documents will be restricted for twenty five years, or until five years after the death of Dr. Kissinger, whichever is later. Access to the telephone transcripts is subject to a further limitation: if one of the parties to the conversation is still living when the papers become available for public access, the consent of that party must first be secured.

There are two leading cases on the issue of the ownership of papers and documents produced by public officials during their tenure in office. *United States v. First Trust Company of St. Paul,* 146 F. Supp. 652 (D. Minn., 1956), *aff'd* 251 F.2d 686 (8th Cir. 1958) (hereinafter cited as *"Saint Paul"*), and *Public Affairs Associates v. Rickover,* 177 F. Supp. 601 (D.D.C. 1959), *rev'd in part,* 284 F.2d 262 (D.C. Cir., 1960), *judgment vacated,* 369 U.S. 111 (1962), *remanded for new trial* 268 F. Supp. 444 (D.D.C. 1967) (hereinafter cited as *Rickover*).

The *Saint Paul* case was an action to quiet title to certain notes made by William Clark during the Lewis and Clark expedition through the Louisiana Territory in 1803. After the notes had been discovered by chance in 1952, the United States intervened to assert its title to them. The trial court ruled against the Government and the Court of Appeals affirmed. The Court of Appeals, however, stated the general principle that if Clark's notes were the written records of a government officer executed in the discharge of his official duties, then they would be public documents and ownership would be in the United States, 251 F.2d at 688. The ruling of the court was thus based on an examination of the circumstances in which the notes were written.

During the expedition, William Clark was second in command to Meriwether Lewis. President Jefferson had instructed Lewis in great detail to make and preserve a record of his observations, but made no mention of others in the party keeping an official record, diary, or notes. Lewis did keep a record, apparently in accord with Jefferson's instructions. Clark's notes did contain much observational data, but they also contained a great many personal and private notations not found in notes of an official character or in an official record. Other members of the expedition kept diaries and notes which the government had never claimed. Lewis at one point sent Jefferson a copy of Clark's

"private journal" for his own perusal, but not as an official document of the expedition. In the light of these and other similar factors, the courts ruled that the notes were the private and personal writings of Clark, unofficial in character, and therefore not the work product of a government representative engaged in the performance of his duties, 251 F.2d at 690.

The question of the literary rights of a public official in his speeches was litigated in the *Rickover* case, which consumed more than eight years in the courts. The original trial court held that a Government official has a literary property right in writings or speeches which have some bearing on, or arise out of his official actions, as long as the writing or delivery of the work is no part of his official duties. Literary products in this category remain the property of the author to the extent that they are protected by the common law and by the law of copyright, and his rights are not affected by the fact that he is a Government officer or employee, 177 F. Supp. at 604.

The trial court was reversed by the Court of Appeals on the grounds that the distribution of copies of the speeches placed them in the public domain before the copyright had been obtained, thereby forfeiting the copyright, 284 F.2d 262. The Supreme Court, however, vacated this judgment because of inadequate record, and remanded for a new trial, 369 U.S. 111.

In the *Rickover* case, on remand, the court stated that the fundamental determination in resolving the ownership issue was whether the disputed speeches fell within the purview of Admiral Rickover's official duties. Those duties, the court said, were a matter of contract between the Admiral and the Navy Department. The court noted the broad authority vested in Rickover as head of the nuclear propulsion program, and his power to act in a variety of ways not enumerated in his position description. In this context, the court ruled, "the duties of a high Government

official should not be narrowly interpreted. Consequently, *the circumstances of the preparation and delivery of the speeches and the speeches themselves must be examined to determine whether the Admiral was acting in his public or his private capacity.*" 268 F. Supp. at 448-49 (emphasis added).

In resolving the ownership of the Rickover speeches, the court relied on the following factors: the invitations to speak were extended to Rickover in his private capacity; the speeches were prepared at his home; "purely mechanical operations" were performed when the final manuscript was typed and duplicated on Navy facilities by the Admiral's administrative assistant; the duplication was in part for the official purpose of obtaining security review and in part for the unofficial purpose of providing copies to press and public; copyright notice was in his own name, without official title; the speeches were delivered on his own time. In short, the court ruled, both speeches were handled as private business from start to finish. 268 F. Supp. at 449.

Under the principles set forth in the *Rickover* and *St Paul* cases, if the transcripts are the written records of a government officer executed in the discharge of his official duties, they are public documents and ownership is in the United States. Whether the transcripts were prepared in the Secretary's public or private capacity must be determined by an examination of the circumstances of the preparation and delivery of the transcripts and an examination of the transcripts themselves.

An examination of the transcripts themselves is not within the scope of this report. Moreover the circumstances surrounding their preparation are not clear. The State Department, however, has indicated that monitoring of telephones is prohibited except for the most limited circumstances. The one exception is to permit a third party to listen to the telephone conversations of the "senior principle officers" of the Department "for the purpose of taking notes or making appointments or to improve the

general efficiency of operations." According to the Department, the Federal Property Management Regulations (FPMR) permit monitoring "only when an exception to the general prohibition is deemed absolutely necessary to the conduct of business." Letter from Kempton B. Jenkins, Acting Assistant Secretary for Congressional Relations, Department of State to: The Honorable Bella S. Abzug, Chairwoman, Government Information and Individual Rights Subcommittee, House of Representative, October 7, 1976, citing FPMR 101-35.308.

If regulations permit monitoring only when deemed "absolutely necessary for the conduct of business," then the conversations must have been part of the official duties of the Secretary of State. The transcripts of those conversations would therefore relate to the Secretary's public rather than private capacity. Under the *Rickover* and *St Paul* rule, materials produced by an official in the discharge of his official duties are the public property of the United States rather than the personal property of the official.

On the basis of the above described FPMR provisions and State Department's regulations, and on the authority of the *Rickover* and *St Paul* cases, we are compelled to conclude that the ownership of the secretarial transcripts in question is vested in the United States Government rather than Secretary Kissinger.

It should be noted that public ownership of the transcripts does not necessarily mean that they are "records" or "agency records" within the meaning of the Federal Records Act, the Freedom of Information Act, or the Privacy Act. The status of the manuscripts must be determined independently under each of those laws.

/s/ Vincent E. Treacy
Vincent E. Treacy
Legislative Attorney

EXHIBIT 13

DEPARTMENT OF STATE
Washington, D.C. 20020

October 7, 1976

Dear Mrs. Abzug:

Our study has now been completed and the Secretary has asked me to reply to the questions contained in your letter of July 14 on the telephone monitoring practices of the Department of State. Basically, the Department is subject to the Federal Property Management Regulations (FPMR 101-35.308). Your specific questions are answered as follows:

1. Q: Does the agency presently permit monitoring of incoming or outgoing telephone calls? (for the purpose of this inquiry, "Monitoring" includes, but is not limited to, a secretary or any third person listening in on the line, either covertly or overtly.)

   A: The Department *prohibits* the monitoring of telephone calls except for the most limited purposes.

   1a). Q: For what purpose and under what circumstances does monitoring occur?

   A: The only exception to the general prohibition is to permit a third party to listen to the telephone conversations of the senior principal officers of the Department for the purpose of taking notes or making

The Honorable
Bella S. Abzug, Chairwoman,
Government Information and
Individual Rights Subcommittee
House of Representatives

appointments and to improve the general efficiency of operations. This is done only at the express request of the officer — whose calls are those being monitored.

1b.) Q: Do agency employees consent to monitoring of their telephone conversations and, if so, are their consents given in writing?

A: Again, employees' telephone conversations are not monitored; this is prohibited by the Department. In accordance with the provisions of FPMR 101-35.308, monitoring is permitted only when an exception to the general prohibition is deemed absolutely essential to the conduct of business. Only principals have been permitted to have a monitoring device; in such cases the exception has been granted at his own request to monitor his own telephone conversations.

1c.) Q: To what extent are the employees and outside callers aware of the presence of another party on the line?

A: As noted above, monitoring occurs only in the most limited circumstances. In some of these cases, the other party may not be aware that the call was being monitored.

2. Q: Is tape recording of telephone conversations on the agency's lines presently permitted? If so, do any warning or consent requirements accompany or limit this practice?

A: Only in its Operations Center does the Department have equipment for taping telephone conversations. Activation of this equipment is permitted in only two cases: 1) when an incoming caller requests that his conversation be recorded for later transmission to a third party; 2) in the event of a threatening call such as a bomb threat or warning of terrorist attack. The equipment operates without any "beep" or warning device, since it is used only when the calling party has voluntarily requested its use or in instances when criminal activity is suspected.

3. Q: Does the agency take any measures to minimize its listening time to portions of conversations which are relevant to the purposes of the monitor?

A: Monitoring is authorized only when the principal determines that monitoring by the third party is relevant or necessary to the transaction of business.

4. Q: Are there any regulations controlling the agency's telephone monitoring practices? If so, please include a copy with your reply. Is the agency affected by any general regulations issued by the General Services Administration, the Office of Telecommunications Policy, or the Federal Communications Commission? If so, please cite the regulations.

A: As noted above, the Department is subject to the provisions of the Federal Property Management Regulations (FPMR 101-35.308.)

5. Q: Under what statutory authority does the agency monitor the telephone conversations of its employees and outside callers?

A: Once again, the Department does not monitor the telephone conversations of its employees. The limited monitoring of outside calls described in 2 above, of course, is not done pursuant to specific statutory authority but under the general authority of the Department to conduct its business.

6. Q: Does the agency employ any automatic devices which record dialing impulses or observe service quality? Does use of this equipment fall within the agency's definition of telephone monitoring?

A: The Department of State does not have any equipment which records dialing impulses or observes service quality.

7. Q: What does the agency do with information regarding illegal activity which comes into its hands in the course of telephone monitoring for service or supervisory purposes?

A: The Department of State does not monitor telephone calls for service quality or supervisory purposes.

8. Q: Do the agency's practices ever conflict with State or Federal law? Where and when has this occurred? In the event of a conflict between State and Federal law, which law controls the agency?

A: We are not aware of any instance in which the Department's practices have been in conflict with state or federal law.

9. Q: Does AT&T service the agency's monitoring equipment? Does any AT&T policy constrain the agency's monitoring practices? Do you have

any reason to believe that AT&T has ever participated in any independent or outside monitoring of the agency's lines?

A: The small amount of telephone monitoring equipment at the Department is the property of the C&P Telephone Company and was installed and is maintained by their service representatives. The Department of State has agreed in writing to abide by the regulations of the C&P Telephone Company regarding the operation of these devices. These regulations are based upon applicable FCC regulation. The Department is not aware of any monitoring of the agency's lines by AT&T.

10. Q: Does the agency receive requests to monitor pursuant to court order or for national security purposes? How often has this occurred in the past 10 years, and to what extent does the agency comply with these requests?

A: We are not aware of any instance in which the Department has received a request to monitor calls pursuant to court order or for national security purposes.

I hope that these answers are responsive to your questions.

Sincerely yours,

/s/ Kempton B. Jenkins
Kempton B. Jenkins
Acting Assistant Secretary
for Congressional Relations

EXHIBIT 14

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

DEPARTMENT NOTICE

To All Employees
State, AID, USIA, ACDA

January 24, 1977

Monitoring or Recording of Conversations

Secretary Vance has issued the following instructions:

No officer or employee of the State Department or the Foreign Service shall direct, arrange for, permit, or undertake the monitoring or mechanical or electronic recording of any conversation, including any telephone conversation, without the express consent of all persons involved in the conversation. Any deviation from this rule must be approved in advance by me or my Deputy.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.,
Plaintiffs.,
v.
Civil Action No. 77-0220

CYRUS R. VANCE, et al.,
Defendants.

_____/

ANSWER OF DEFENDANTS VANCE AND BOORSTIN TO AMENDED COMPLAINT

Defendants Cyrus R. Vance and Daniel J. Boorstin, by their undersigned attorneys, (referred to hereafter as defendants) for their answer to the Amended Complaint, admit, deny and otherwise aver as follows:

First Defense

Plaintiffs lack standing to maintain the action.

Second Defense

Cyrus R. Vance is not a proper party to the action.

Third Defense

In answer to the numbered paragraphs of the complaint, defendants Vance and Boorstin admit, deny and otherwise aver as follows:

1. Deny as plaintiffs' characterization of their Amended Complaint.

2. Deny as conclusions of law, except that defendants admit that the documents at issue are now located within the District of Columbia and that acts alleged in the complaint transpired within the District of Columbia and that the

defendants are found within and are subject to service of process in the District of Columbia.

3. Deny for lack of knowledge or information sufficient to form a belief.

4. Deny for lack of knowledge or information sufficient to form a belief.

5. Deny for lack of knowledge or information sufficient to form a belief.

6. Deny for lack of knowledge or information sufficient to form a belief, except defendants admit that plaintiff James MacGregor Burns is Woodrow Wilson Professor of Political Science at Williams College and President-elect of the American Political Science Association, and that he has studied Presidential papers.

7. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Nat Hentoff is a writer.

8. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Donald G. Herzberg is Dean of the Graduate School of Georgetown University and Professor of Government, and that he was Executive Director of the Presidential Commission on Registration and Voting Participation.

9. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff William Leuchtenburg is DeWitt Clinton Professor of American History at Columbia University and that he has done research in Presidential archives, and has written books and articles.

10. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Arthur Link is Edwards Professor of American History at Princeton University and Director of the Woodrow Wilson papers there and that he is an author.

11. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff J. Anthony Lukas has been employed as a writer.

12. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Austin Ranney is Professor of Political Science at the University of Wisconsin and President of the American Political Science Association.

13. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff Clement E. Vose is John E. Andrus Professor of Government at Wesleyan University and aver that he is a representative of the American Political Science Association to the Archives Advisory Counsel of the National Archives and Records Service.

14. Deny for lack of knowledge or information sufficient to form a belief, except to admit that plaintiff William Safire is a columnist for the New York Times and that he was an assistant to the President from 1969 through a portion of 1973.

15. Deny for lack of knowledge or information sufficient to form a belief.

16. Deny as conclusions of law, except to admit that defendant Cyrus R. Vance is the Secretary of State and, in his official capacity, is responsible for the actions of the Department of State, including actions pursuant to the Freedom of Information Act, 5 U.S.C. §552.

17. Deny as conclusions of law, except to admit that defendant Daniel J. Boorstin is the Librarian of Congress and that in his official capacity defendant Boorstin executed agreements with defendant Kissinger, to which reference is made in the complaint, and to aver that the Library of Congress currently has custody of the transcribed Secretarial notes that are the subject of this action.

18. Deny except to aver that defendant Kissinger was assistant to the President for National Security Affairs from approximately January 20, 1969 until approximately November, 1973 and that he became Secretary of State in September, 1973, that the documents at issue in this action are the transcribed secretarial notes of defendant Kissinger's telephone conversations during the time he held those positions and that the Library of Congress now has custody of those notes.

19. Deny for lack of knowledge or information sufficient to form a belief.

20. Deny for lack of knowledge or information sufficient to form a belief.

21. Deny for lack of knowledge or information sufficient to form a belief, except to admit that certain transcripts of conversations, or portions thereof, of defendant Kissinger were prepared by Government employees on Government time and with the aid of equipment and material of the Government during the period when defendant Kissinger served as Assistant to the President for National Security Affairs and Secretary of State.

22. Deny for lack of knowledge or information sufficient to form a belief except to admit that the transcribed notes were held by the Department of State at one time.

23. Deny for lack of knowledge or information sufficient to form a belief.

24. Deny for lack of knowledge or information sufficient to form a belief.

25. Deny for lack of knowledge or information sufficient to form a belief.

26. Deny for lack of knowledge or information sufficient to form a belief.

27. The allegations of paragraph 27 of the complaint are conclusions of law and not allegations of fact to which an

answer is required, but insofar as an answer is deemed required, they are denied.

28. The allegations of paragraph 28 of the complaint are conclusions of law and not allegations of fact to which an answer is required, but insofar as an answer is deemed required, they are denied.

29. Deny for lack of knowledge or information sufficient to form a belief.

30. Deny as an incomplete characterization of Exhibit A to the Amended Complaint, except to admit that Exhibit A to the complaint is a Deed of Gift and Agreement entered into on November 12, 1976 by defendants Kissinger and Boorstin.

31. Deny as an incomplete characterization of Exhibit A to the complaint, to which the Court is respectfully referred for a full and complete statement of its terms.

32. Deny as an incomplete characterization of Exhibit A to the complaint, to which the Court is respectfully referred for a full and complete statement of its terms.

33. Deny as an incomplete characterization of Exhibit A to the complaint, to which the Court is respectfully referred for a full and complete statement of its terms.

34. Deny as an incomplete characterization of the memorandum referred in paragraph 34 of the complaint, except to admit that Exhibit B to the complaint is an authentic copy of a memorandum prepared by Monroe Leigh, then Legal Advisor of the Department of State, dated November 11, 1976.

35. Deny as an incomplete characterization of Exhibit C to the complaint, except to admit that Exhibit C to the complaint is an authentic copy of a Deed of Gift and Agreement entered into by defendants Kissinger and Boorstin, dated December 24, 1976, and the Court is respectfully referred to Exhibit C to the complaint for the full and

accurate terms of the agreement.

36. Deny as an incomplete characterization of the contents of Exhibit C to the complaint, to which the Court is respectfully referred for a full and complete statement of the provisions thereof.

37. Deny as an incomplete characterization of the contents of Exhibit C to the complaint, to which the Court is respectfully referred for a full and complete statement of the provisions thereof.

38. The allegations of paragraph 38 of the complaint are conclusions of law to which no answer is required but, insofar as an answer is deemed required, they are denied.

39. The allegations of paragraph 39 of the complaint are conclusions of law to which no answer is required but, insofar as an answer is deemed required, they are denied.

40. The allegations of paragraph 40 of the complaint are conclusions of law to which no answer is required but, insofar as an answer is deemed required, they are denied.

41. Deny except to admit that Exhibit D to the complaint is an authentic copy of a letter dated January 4, 1977 to defendant Kissinger from the Archivist of the United States and defendants respectfully refer the Court to Exhibit D to the complaint for the complete provisions of said letter.

42. Deny as an incomplete and inaccurate characterization of the letter attached to the complaint as Exhibit E, except to admit that Exhibit E to the complaint is an authentic copy of a memorandum dated January 14, 1977 from Monroe Leigh and that defendant Kissinger did not accede to the Archivist's request, as reflected in a letter dated January 18, 1977.

43. Deny as an incomplete statement of the contents of Exhibit F to the complaint, except to admit that by letter dated January 14, 1976 plaintiff William Safire submitted a letter to the Department of State, and that Exhibit F to the

Amended Complaint is an authentic copy of that letter.

44. Deny as an incomplete statement of the correspondence referred to in paragraph 44 of the Amended Complaint, except to admit that by letter dated February 11, 1976 the Director of the Department of State's Freedom of Information Act staff informed plaintiff Safire the request which plaintiff Safire made in the letter attached to plaintiffs' Exhibit F had been denied.

45. Admit.

46. Deny as an incomplete statement of the correspondence referred to in paragraph 46 of the complaint, except to admit that by letter dated March 29, 1976 plaintiff Safire's appeal was denied.

47. Deny as an incomplete statement of the correspondence referred to in paragraph 47 of the complaint, except to admit that plaintiffs, through their attorneys, forwarded a letter dated January 13, 1976 to the Department of State and that an authentic copy of that letter is attached to the Amended Complaint as Exhibit H.

48. Deny as an incomplete portrayal of the correspondence referred to in paragraph 48 of the complaint, except to admit that by letter dated January 28, 1977, the Department of State responded to plaintiff's request included in the letter attached to the complaint as Exhibit H and that Exhibit I to the complaint is an authentic copy of the Department of State's January 28, 1977 letter.

49. Deny for lack of knowledge or information sufficient to form a belief and as conclusions of law.

50. Deny for lack of knowledge or information sufficient to form a belief and as conclusions of law.

Defendants deny each and every allegation of the complaint not expressly admitted or qualified above.

Defendants deny that plaintiffs are entitled to the relief

prayed for in the complaint or to any relief whatsoever.

WHEREFORE, having fully answered, defendants pray that the action be dismissed with prejudice and that defendants be granted their costs.

Respectfully submitted,

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

/s/ Irwin Goldbloom
IRWIN GOLDBLOOM
Deputy Assistant
Attorney General

/s/ Jeffrey Axelrad
JEFFREY AXELRAD

Attorney, Department of Justice
Washington, D.C. 20530
Tel: 202-739-3300

Attorneys for Defendants
Vance and Kissinger

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	Civil
v.	)	No.
	)	77-0220
CYRUS R. VANCE, et al., Defendants	)	

ANSWER OF DEFENDANT HENRY A. KISSINGER

Defendant Henry A. Kissinger, by his undersigned attorneys, in answer to the Amended Complaint filed herein, says:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

Plaintiffs lack standing to maintain this action.

THIRD DEFENSE

The Amended Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Amended Complaint, defendant Kissinger admits, denies and otherwise avers as follows:

1. Defendant admits that the action purports to be as

alleged in paragraph 1 of the Amended Complaint, but denies that there has been any violation of the plaintiffs' constitutional or statutory rights.

2. Defendant denies that any of the statutes cited in paragraph 2 of the Amended Complaint confer subject matter jurisdiction over such portion of the action as pertains to defendant Kissinger, and further denies that the amount in controversy, exclusive of interest and cost, exceeds in monetary value the sum of $10,000. Defendant admits that if jurisdiction is found by the Court, venue is proper.

3-14. Defendant admits on information and belief the allegations contained in paragraphs 3 through 14 of the Amended Complaint, except that defendant lacks information or knowledge sufficient to form a belief respecting any of the plaintiffs' future writing plans or the publishing contracts of plaintiffs Burns, Leuchtenburg, and Link, and accordingly denies such allegations. Defendant further denies that any of the plaintiffs require access to the transcribed secretarial notes at issue in this action in order to continue their research and writing activities.

15. Defendant admits on information and belief that plaintiffs desire to study the telephone conversations of defendant reflected in the transcribed notes at issue, as alleged in the second sentence of paragraph 15 of the Amended Complaint, but denies that any such plaintiffs have "direct, immediate and specific legal interests in assuring that the original notes of conversations at issue in this action are preserved, maintained and controlled as property of the United States government and its citizens", as alleged in the first sentence of said paragraph 15. Defendant further denies the allegations of the third sentence of said paragraph 15.

16. Defendant admits the allegations of paragraph 16 of the Amended Complaint, except that defendant denies that

the transcribed notes at issue constitute records of the Department of State and further denies that defendant Vance has any obligations under the Freedom of Information Act to reclaim and make available to the public such records.

17. Defendant admits the allegations of paragraph 17 of the Amended Complaint, except that defendant denies that defendant Boorstin is currently the custodian of portions only of the notes at issue in this litigations, and avers that all such notes are now and since December 28, 1976, have been in the custody of defendant Boorstin.

18. Defendant admits the allegations of paragraph 18 of the Amended Complaint, except that defendant denies that he and his designees now have custody of portions of the notes at issue in this litigation and avers that all such notes are now and since December 28, 1976, have been in the custody of defendant Boorstin.

19. Defendant admits the allegations of paragraph 19 of the Amended Complaint, but avers that the monitoring referred to therein included all telephone conversations of defendant without regard to the subject matter discussed or the identity of the persons spoken with.

20. Defendant admits that substantially verbatim transcripts reflecting the contents of some of the conversations described in paragraph 20 of the Amended Complaint were made, but avers that many of the subject transcripts are inaccurate and incomplete.

21. Defendant admits the allegations of paragraph 21 of the Amended Complaint, but avers that the notes referred to were prepared by his secretaries whose official duties included preparation of private correspondence and other personal memoranda as well as the preparation of official correspondence and further avers that the secretarial notes at issue in this litigation were personal work aids and not official documents.

22. Defendant denies the allegations of paragraph 22 of the Amended Complaint, and avers that such secretarial notes were retained by him as personal work aids and stored in his personal files maintained at the government offices where he worked.

23. Defendant admits the allegations of paragraph 23 of the Amended Complaint, but avers that such secretarial notes also reflect private telephone conversations which do not reflect decisions, policies, deliberations, analyses, actions, or contemplated actions of an official character. Defendant further avers that extracts were made of all significant policy decisions and actions contained in such secretarial notes, and placed in the files of the government agencies having an interest therein.

24-25. Defendant admits that the secretarial notes were made available to members of his immediate staff for administrative purposes, but denies that such notes were reviewed or otherwise used by him in the performance of any Government business.

26-28. Defendant denies the allegations of paragraph 26 through 28 of the Amended Complaint.

29. Defendant lacks information or knowledge sufficient to form a belief concerning plaintiffs' status as "an inherent part of the ongoing political process," as alleged in the first sentence of paragraph 29 of the Amended Complaint, and accordingly denies such allegations. With respect to the second and third sentences of said paragraph 29, defendant admits that the "ongoing political process" depends on "continuing and informed analysis, interpretation, and debate concerning issues of public interest and importance," but denies that plaintiffs will be unable to perform whatever function they may have as participants in such process if they are denied access to the secretarial notes at issue in this litigation.

30-33. Defendant admits the allegations of paragraphs

30 through 33 of the Amended Complaint, but respectfully refers the Court to Exhibit A to the Amended Complaint for a full and complete statement of the terms of said Exhibit A.

34. Defendant admits the allegations of paragraph 34 of the Amended Complaint, but respectfully refers the Court to Exhibit B to the Amended Complaint for a full and complete statement of the matters contained in said Exhibit B.

35. Defendant admits the allegations of paragraph 35 of the Amended Complaint, but respectfully refers the Court to Exhibit C to the Amended Complaint for a full and complete statement of the terms of said Exhibit C.

36-40. The allegations of paragraphs 36 through 40 of the Amended Complaint state conclusions of law to which defendant is not required to respond. To the extent a response may be deemed necessary or appropriate, such allegations are denied.

41-42. Defendant admits the allegations of paragraphs 41 and 42 of the Amended Complaint, but respectfully refers the Court to Exhibits D and E to the Amended Complaint for a full and complete statement of the matters contained therein.

43. Defendant admits the allegations of paragraph 43 of the Amended Complaint on information and belief, but respectfully refers the Court to Exhibit F for a full and complete statement of the matters contained therein.

44-46. Defendant lacks knowledge or information sufficient to form a belief concerning the allegations of paragraphs 44 through 46 of the Amended Complaint, and accordingly such allegations are denied.

47-48. Defendant admits the allegations of paragraphs 47 and 48 of the Amended Complaint on information and belief, but respectfully refers the Court to Exhibits H and I to the Amended Complaint for a full and complete

statement of the matters contained therein.

49. Defendant denies the allegations of the first, fourth, and fifth sentences of paragraph 49 of the Amended Complaint. Defendant lacks knowledge or information sufficient to form a belief respecting the allegations of the second and third sentences of said paragraph 49, and accordingly denies such allegations.

50. Defendant denies the allegations of paragraph 50 of the Amended Complaint.

Defendant denies each and every allegation of the Amended Complaint not expressly admitted or qualified herein.

WHEREFORE, defendant Henry A. Kissinger, having fully answered the allegations in the numbered paragraphs of the Amended Complaint, prays that the Amended Complaint be dismissed with prejudice and that he be granted his costs.

Respectfully submitted,

/s/ David Ginsburg
David Ginsburg

/s/ James E. Wesner
James E. Wesner

/s/ Martha Jane Shay
Martha Jane Shay

GINSBURG, FELDMAN AND BRESS
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Defendant
Henry A. Kissinger

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants	)	

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Rule 1-9(h) of the Rules of the United States District Court for the District of Columbia, plaintiffs submit the following Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried. The portions of the record which support each paragraph in this Statement are contained in the appendices and affidavits that accompany plaintiffs' Memorandum of Points and Authorities. References to the appropriate appendix or affidavit appear at the close of each paragraph in the Statement.

1. During his service as Assistant to the President and Secretary of State, defendant Kissinger caused substantially all of his telephone conversations concerning official matters to be monitored or recorded. (App. I-2, I-4, I-7, I-8; Affidavit of William Safire, ¶ 4).

[1] "App" denotes appendices to Plaintiffs' Memorandum of Points and Authorities.

2. At defendant Kissinger's direction, verbatim transcripts of these conversations, or secretarial notes that reflected their contents substantially verbatim, were prepared after the conversations took place. (Affidavit of William Safire, ¶ 4; App. I-2, I-4, I-8.)

3. The monitoring of defendant Kissinger's telephone conversations, and the preparation of transcripts or notes based thereon, were performed by employees of the Federal government discharging their official duties. (App. I-2, I-4, I-8, II-4.)

4. The monitoring of defendant Kissinger's telephone conversations, and the preparation of transcripts and notes based thereon, occurred on government time and with the aid of government equipment, materials, office space and other public resources. (App. I-2, I-4, I-8, II-4.)

5. After they were prepared, the notes of defendant Kissinger's official conversations were stored in either White House or Department of State files. (App. I-IV.)

6. While defendant Kissinger was Secretary of State, Department of State policy allowed Department employees to monitor the telephone conversations of senior officials, and to prepare notes summarizing those conversations, only when "deemed absolutely necessary to the conduct of business." (App. III-2.)

7. The purpose for which the secretarial notes of defendant Kissinger's conversations were prepared was to assist him in performing his official duties by functioning as a memory aid and facilitating the implementation and follow-up of the business transacted during the conversations. (App. I-4, II-2, XIII-1.)

8. On occasion, the secretarial notes of defendant Kissinger's official conversations were reviewed by his immediate aides in the course of transacting government business. (App. II-2.)

9. On occasion, the secretarial notes of defendant Kissinger's official conversations were reviewed by other government officials. (Affidavit of William Safire, ¶ 5.)

10. On November 12, 1976, defendant Kissinger entered into a Deed of Gift and Agreement (the "First Agreement") with defendant Daniel Boorstin, the Librarian of Congress. (App. IV-1.)

11. Under the First Agreement, defendant Kissinger, acting as a private citizen, purported to donate to the Library of Congress a collection of personal and governmental papers. (App. IV-1.)

12. Under paragraph 4 of the First Agreement, public access to these materials will not begin until after 25 years or 5 years from the death of defendant Kissinger, whichever occurs later. (App. IV-3, IV-4.)

13. Until public access to the materials begins, paragraph 7 of the First Agreement limits their availability to (1) employees of the Library of Congress that have been jointly approved by the Librarian of Congress that have been jointly approved by the Librarian of Congress and defendant Kissinger; (2) persons who have received the written permission of defendant Kissinger; and (3) after defendant Kissinger's death, persons who have received the written permission of a committee to be named in his will. (App. IV-5.)

14. Under paragraph 6 of the First Agreement, defendant Kissinger is entitled to unrestricted access during his lifetime to the materials covered by the Agreement. (App. IV-4.)

15. Under paragraph 6, the Library of Congress is obligated to provide defendant Kissinger with working space where he can use the materials and to permit examination of the materials by all research assistants employed by him who have appropriate security clearances. (App. IV-4).

16. On December 24, 1976, defendants Kissinger and Boorstin entered into a Second Deed of Gift and Agreement (the "Second Agreement") under which defendant Kissinger "donated" to the Library of Congress the transcribed secretarial notes of his telephone conversations while a government employee. (App. V-1.)

17. The Second Agreement incorporates by reference all the terms and conditions of the First Agreement and further provides that public access to the notes of defendant Kissinger's telephone conversations will be permitted only with the consent, or upon the death, of the other parties to the telephone conversations in question. (App. V-1.)

18. In a letter to defendant Kissinger dated January 4, 1977, the Archivist of the United States requested that archivists working under his supervision be permitted to inspect the secretarial notes of defendant Kissinger's conversations. (App. VI-1, VI-2.)

19. In a letter to the Archivist dated January 18, 1977, defendant Kissinger rejected the Archivist's request. (App. VII-1.)

20. On January 14, 1976, plaintiff William Safire asked the Department of State to provide, pursuant to the Freedom of Information Act, (1) all notes of defendant Kissinger's telephone conversations in which his own name appeared, and (2) all notes of conversations between Mr. Kissinger and certain designated individuals in the course of which information leaks from government agencies during the Nixon Administration were discussed. (App. XV-2.)

21. In a letter dated February 11, 1976, the Department of State denied plaintiff Safire's request — *inter alia*, on the ground that the secretarial notes of defendant Kissinger's telephone conversations do not constitute "agency records" subject to the Freedom of Information Act. (App. XVI-2.)

22. Plaintiff Safire filed an appeal from the Depart-

ment's denial of his request on February 24, 1976. (App. XVII.)

23. On March 29, 1976, the Chairman of the Department's Council on Classification Policy wrote to Mr. Safire to affirm that denial — among other grounds, on the basis that the notes of defendant Kissinger's telephone conversations are not "agency records" within the meaning of the Freedom of Information Act. (App. XVIII-2.)

24. On January 13, 1977, the remaining plaintiffs, through their attorneys, submitted to the Department of State a Freedom of Information Act request for all the transcribed secretarial notes of defendant Kissinger's official telephone conversations. (App. VIII-1.)

25. The Department denied plaintiffs' request in a letter dated January 28, 1977. The letter asserts that the notes of defendant Kissinger's conversations are not "agency records" subject to the Freedom of Information Act and advises plaintiffs that, in any event, the notes are no longer in the Department's custody. The letter also informs plaintiffs that recourse to the Department's Freedom of Information Act appeal procedures is unnecessary. (App. VIII-1, VIII-2.)

Respectfully submitted,

Charles A. Horsky

/s/ Peter Barton Hutt
Peter Barton Hutt

/s/ Robert Matthew Sussman
Robert Matthew Sussman

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

April 18, 1977 *Attorneys for Plaintiffs*

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN, et al., Plaintiffs,	)	
v.	)	Civil Action No. 1187-73
HENRY A. KISSINGER, et al., Defendants.	)	

FEDERAL DEFENDANT KISSINGER'S RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Comes now Federal defendant Henry A. Kissinger, by and through his undersigned attorneys, and responds to the Plaintiffs' Interrogatories as follows:

(1) Please describe, give the date of, and identify who was present at any and all meetings which you attended during 1969, prior to May 9, at which any of the following subjects were discussed: (a) leaks, (b) wiretapping of government officials and newsmen, (c) the hiring or retention on your staff of Morton Halperin.

Response: 1(a). With respect to meetings prior to May 9, 1969, at which leaks were discussed:

In this period, basic changes in policies were being considered which would establish fundamental approaches to major foreign policy and national security issues, including, for example, reexamination of the United States strategic posture, negotiating positions in the strategic arms limitations talks (SALT), a new initiative toward the People's Republic of China, negotiations to end the war in Vietnam, defense and political issues before the Atlantic Alliance, the Arab-Israeli dispute and East-West trade.

Because of the complexity and sensitivity of these matters, we earnestly believed that secrecy with respect to their consideration and of decisions taken was of vital importance and that success or failure of particular initiatives could depend upon the maintenance of the necessary confidentiality. Consequently, there was great concern about leaks in this period. I had conversations on the subject of leaks with the individuals referred to in my response to Question 1(a) as well as others.

Business telephone calls from my White House office were usually monitored by my personal secretaries, who then prepared brief summaries of those conversations. The summaries are not complete, and may not, in some cases accurately reflect the substance of the conversations covered. An examination of these summaries of conversations prior to May 9, 1969, does not disclose any conversation concerning Morton Halperin or the wiretap program. They do, however, reflect some conversations in which leaks were discussed, the gist of which is set forth below.

Federal defendant Kissinger objects to providing the names of third persons not parties to this litigation on the grounds that the names of those persons are not relevant to the litigation, and further that providing such names would constitute a violation of the right of privacy of such persons.

On February 3, 1969, I spoke with [A]. The summary of that conversation states, in part: "K and [A] discussed press leaks."

On February 19, 1969, I had a conversation with [B]. The summary of that conversation states, in part: "K said this was probably unnecessary call but President is very anxious that there be no leaks of any sort about trend of the discussion today. [B] said he would say nothing."

On March 18, 1969, I had a conversation with [C]. The summary states, in part: "HAK said the President's first

concern was if the things we are trying to do leaked, it would lose its effectiveness."

On March 28, 1969, I had a conversation with [D] regarding stories in the *Times* and *Post* on March 27 and March 28. [D] reported on his unsuccessful efforts to find the source of the leaks.

Federal defendant Kissinger objects to responding to this interrogatory as it relates to Henry Brandon. Because Brandon is not a party to the litigation, inquiry as to him is not relevant. Further, any response by the Federal defendant may constitute an infringement of Brandon's right of privacy.

71 A. What records did you make in the period Jan. 21, 1969 to Feb. 12, 1971 of (i) meetings you attended (ii) persons who visited your office (iii) telephone conversations in which you participated (iv) correspondence you wrote or received?

Response: With respect to records of meetings I attended or persons who visited my office:

From January 21, 1969, through October 21, 1969, an appointments book was kept, listing daily appointments as they were scheduled. This usually listed only formal meetings, outside appointments, or appointments with outside visitors. From October 22, 1969, through February 12, 1971, a daily record of schedule was kept, which recorded the events of the day as they occurred. This record, unlike the appointments book, included some of my informal activity in the White House and reflects all those, including my staff, who entered my office. These records were kept by my secretaries, who were usually not in a position to record subject matter of discussions, whom I met with in all meetings outside my own office, or my daily activities when outside of Washington.

With respect to records of telephone conversations in which I participated and correspondence I wrote or

received during the period January 21, 1969 through February 12, 1971:

Business telephone conversations from my White House office during this period were usually monitored by my personal secretaries and records prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted.

Correspondence was deposited with White House Central Files or Substantive Files.

71 B. Where and in whose custody are such records now? If you do not know where they are now, where and in whose custody were they last, to your knowledge?

Response: All such records, with the exception of the records of my telephone calls, are in the White House. They are in the custody of the NSC staff. The telephone records are in the State Department, in the custody of Mr. Lawrence S. Eagleburger.

/s/ Henry A. Kissinger
HENRY A. KISSINGER

[Jurat omitted in printing]

Respectfully submitted,

RICHARD L. THORNBURGH
Assistant Attorney General

/s/ Robert L. Keuch
ROBERT L. KEUCH
Attorney, Department of Justice

/s/ Edward S. Christenbury
EDWARD S. CHRISTENBURY
Attorney, Department of Justice

/s/ Elizabeth Gere Whitaker
ELIZABETH GERE WHITAKER
Attorney, Department of Justice
Washington, D.C. 20530
202 739-5282

Counsel for Federal
defendant Kissinger

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN, et al., Plaintiffs,	)	
	)	Civil
vs.	)	Action
	)	No. 1187-73
HENRY A. KISSINGER, et al., Defendants.	)	

Deposition of HENRY A. KISSINGER

[pp. 92-95; 99]

What are those documents?

A The same documents you have been showing me.

Q All of those documents have been made available to us that you consulted in connection with preparation, other than those which relate to other people?

A I will have to ask my lawyers.

MR. KEUCH: Yes, I will state for the record that we have been working with the Secretary's staff trying to exhaust every document that he was using, and have tried to comply as fully as we can within the range of human perfection.

BY MR. SLOCOMBE:

Q Does the appointment book which you refer to — I think it is the very last answer — 71A on page 46, next-to-the-last answer — that appointment book presumably covers April 25, 1969.

A Well, I have explained to you that between — from January until October, my records were very sporadic, and cover no internal appointments at all. They only covered people who came in — or substantially people who came in from the outside to see me.

From October 1970 on, we kept a detailed log that would account for practically all of my day. And, therefore, for

that precise period, my own records are very inconclusive.

Q I would still request that the April 25th, 1969, appointment book be made available to us under the same rules as the others have, that is, with everybody blocked out except the parties and Mr. Hoover.

MR. KEUCH: If we can find any such document for that date, we will supply it.

MR. SLOCOMBE: Our next exhibit is Plaintiff's W.

(The document referred to was marked for identification as Plaintiff's Exhibit W)

BY MR. SLOCOMBE:

Q I take it that in the period that we are talking about, that is, January 1969 through February of 1971, you did not — did you cause any recordings or monitoring to be made of your telephone conversations that produced a written record?

A I don't remember — the reason taping was instituted of telephone conversations— I don't remember when it was, that it was instituted. It was a technical device, because too much of the time of the secretaries during the day was consumed in listening to the conversations. The tapes were then transcribed in the evening and destroyed that same evening. No tapes were ever kept.

Q You say in your answers that they were monitored by personal secretaries and records prepared.

A I would suppose during that period that was the case.

Q Someone just sat and listened.

A Someone sat and listened and took shorthand.

Q Have you searched yourself or caused a search to be made through those monitored records for references to the wiretap program, and specifically the wiretap on Morton Halperin?

A Yes, and I haven't found anything.

Q Who conducted that search?

A Mr. Eagleburger. I have never looked at these records.

Q Mr. Eagleburger actually read through the transcripts of the telephone conversations?

A To the best of my knowledge, for the questions that you asked in the interrogatories.

Q Did he also read through the transcripts to see if there was any information in those transcripts relating to matters relevant to this case?

A I am not sure, we would have to ask him.

Q I want to request that that be done, because I think that that is a matter which is within the scope of our Rule 34 request of records relating, a search of records relating to —

MR. KEUCH: We will consider that request, Mr. Slocombe, and respond to you as soon as we can.

BY MR. SLOCOMBE:

Q Our final exhibit is Plaintiff's W, which is an article from the New Republic by John Osborne, and I call your attention to the paragraph on —

A What's the date?

Q January — February 14, 1976. I call your attention to page 9, the righthand column, about halfway down the continuation paragraph, where it says "It was in private communication with journalists that Kissinger got himself into trouble and generated a doubt, usually reflected rather than explicitly stated in print and in broadcast, about his believability. In two examples drawn from my experience . . ." —

A Wait a minute, where are you now?

Q Page 9, the righthand paragraph, about the middle of the first paragraph, at the top of the page

MR. KEUCH: We have it.

* * *

I have read the foregoing 98 pages, which contain a correct transcript of the answers made by me to the questions therein recorded.

/s/ Henry A. Kissinger
HENRY A. KISSINGER

[Jurat omitted in printing]

APPENDIX IX

THE WASHINGTON POST
Feb. 11, 1977

KISSINGER SIGNS BOOK CONTRACT FOR MEMOIRS

By Christopher Dickey
Washington Post Staff Writer

Former Secretary of State Henry A. Kissinger has signed a contract with Little, Brown and Co., a subsidiary of Time Inc., for the publication of his memoirs in the United States and Canada.

Though the amount paid to Kissinger was not revealed by any parties directly involved with the contract, several industry sources place the figure at about $2 million.

There had been speculation that Kissinger would receive a much higher sum — as much as $5 million — in a single deal including all subsidiary rights. But Little, Brown has bought only the U.S. and Canadian hardback, paperback and book club rights to the memoirs, the company's president, Arthur II Thornhill Jr., said "We have not purchased the foreign rights. Serialization and syndication rights will probably not be sold for a few weeks," he said.

At least two houses, Simon and Schuster and Holt, Rinehart and Winston were known to be using the figure of $1 million as a guideline to the value of foreign, serialization, and syndication rights in determining their bids for the memoirs. Television and movie rights have also been retained by Kissinger. Their value is unclear.

(See KISSINGER, A6, Col. 3)

KISSINGER GETS MEMOIRS PACT, AMOUNT IS SEEN AT $2 MILLION

KISSINGER, From A1

Stewart Richardson, editor-in-chief of Doubleday, said that his company had only been interested in acquiring the entire rights package.

The sale of the remaining subsidiary rights will be handled by Kissinger's agent, Marvin Josephson. Thornhill expects to have a voice in "coordinating" the negotiations.

In the official announcement, Thornhill said, "I expect the book to be completed in the fall of 1979. The author intends to treat his role in government from 1963 to 1976 in depth." That period included the withdrawal from Vietnam, the peace negotiations in the Middle East, and Watergate.

Thornhill suggested that these "momentous events in United States history will make Dr. Kissinger's book fascinating and extremely valuable."

APPENDIX XI

GENERAL SERVICES ADMINISTRATION
WASHINGTON, D.C. 20405

November 15, 1976

GSA BULLETIN FPMR B-65
ARCHIVES AND RECORDS

TO: Heads of Federal Agencies
SUBJECT: Disposition of personal papers and official records

1. *Purpose.* This bulletin summarizes the requirements of Federal law and related regulations and reminds all Federal agencies of their legal responsibility to (a) inform agency officials and personnel about established procedures for maintaining personal papers and (b) ensure the security and integrity of Federal records.

2. *Expiration date.* This bulletin contains information of a continuing nature and will remain in effect until canceled.

3. *Background.*

a. 44 U.S.C. 3301 legally defines the word "records" to include —

> . . . all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational

> value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference and stocks of publications and of processed documents are not included.

b. FPMR 101-11.202-2(d) provides a legal definition of personal papers and prescribes standards for their maintenance —

> Papers of a private or nonofficial character which pertain only to an individual's personal affairs that are kept in the office of a Federal official will be clearly designated by him as nonofficial and will at all times be filed separately from the official records of his office. In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files . . . .

c. The definition of official records involves materials made or received either in pursuance of Federal law or in connection with the transaction of public business. The definition of personal papers covers material pertaining solely to an individual's private affairs. In other words, correspondence designated "personal," "confidential," or "private," etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of Federal law pertinent to the maintenance and disposal of such records. Official records are public records and belong to the office rather than to the officer.

d. The legal definition of records (44 U.S.C. 3301) specifically excludes "extra copies of documents preserved

only for convenience of reference." Such extra copies of documents are commonly regarded as nonrecord materials and are disposable without reference to the requirements of chapter 33, Title 44, United States Code. A Government official may accumulate for convenience of reference extra copies of papers and other materials which he has drafted, reviewed, or otherwise acted upon. When deposited in a research institution, extra copies can serve the needs of historical scholarship. Government officials may be permitted to retain these extra copies, provided that such retention would not (1) diminish the official records of the agency; (2) violate confidentiality required by national security, privacy, or other interests protected by law; or (3) exceed normal administrative economies.

e. Federal law (44 U.S.C. 3105) requires heads of Federal agencies to establish safeguards against the removal or loss of Federal records. Such safeguards include notifying agency officials that (1) the alienation and destruction of records in agency custody is governed by specific provisions of chapter 33, Title 44, United States Code, and (2) criminal penalties are provided for the unlawful removal or destruction of Federal records (18 U.S.C. 2071) and for the unlawful disclosure of certain information pertaining to national security (18 U.S.C. 793, 794, and 798).

f. Federal law (44 U.S.C. 3106) requires heads of Federal agencies to notify the Administrator of General Services of any actual or threatened unlawful removal or destruction of records in their custody. The Archivist of the United States has been delegated authority to assist agency heads in initiating action through the Attorney General for the recovery of records unlawfully removed.

4. *Requested action to be taken by agencies.*

a. Agency heads should review their records management programs and determine whether adequate

safeguards exist against the inadvertent or unlawful loss of Federal records. Adequate safeguards include the following measures:

(1) Ensure that employees are acquainted with the Federal law governing the disposition of official records. Disposal of Federal records can occur only as a result of authorization of NARS approved records control schedules or provisions of general records schedules covering records common to one or more Federal agencies.

(2) Ensure that employees are aware of the criminal penalties that attach to the unlawful removal or destruction of Federal records. Employees also should be made aware of their legal responsibility for informing their records management officer of any actual or threatened unlawful loss or removal of official records.

(3) Ensure that employees are aware of the requirement for identifying and maintaining their personal papers separately from official records. Records management officers should monitor compliance with this requirement on a regular basis.

b. An effective means of bringing these legal requirements to the attention of agency personnel is incorporation of the requirements into agency files maintenance manuals and records control schedules. Adequate and proper separation and control of personal papers at the time of their creation offers the best approach for avoiding the problem of commingled personal and official papers. Widespread knowledge of the requirement for identifying and separating official from private papers at the time of their creation can assist greatly in establishing adequate and proper control over private papers.

5. *Assistance to agencies.* The National Archives and Records Service will assist agencies in appraising a body of materials and determining whether it comprises personal

papers or official records. O al requests for such assistance should be directed to the Records Disposition Division, Office of Federal Records Centers, telephone number 376-8845. Written requests should be forwarded to the General Services Administration (NC), Washington, DC 20408.

/s/ James B. Rhoads
JAMES B. RHOADS
Archivist of the United States

APPENDIX XII

THE WHITE HOUSE
WASHINGTON

November 30, 1976

MEMORANDUM FOR THE WHITE HOUSE STAFF

FROM: PHILIP W. BUCHEN /s/ P.W.B.

SUBJECT: PRESIDENTIAL PAPERS

The President intends to arrange for the deposit of papers related to his administration as President in a library similar to the libraries for papers of other Presidents. There they will be preserved and made accessible for research and reference purposes, along with his papers that are related to the other public offices he has held and to his political activities. For historical purposes, it is most important that the library collection be complete and comprehensive and that there be no omission or loss of documents which may have historical value.

This memorandum sets forth guidelines for handling the papers and other materials in the custody of various members of the President's staff that apply to the papers of the White House Office, the Domestic Council, the Economic Policy Board, the Energy Resources Council, and the Council on International Economic Policy and to the Presidential files of the National Security Council. The papers of staff members within other offices of the Executive Office of the President, e.g., OMB, CEA, CEQ, STR, OTP, etc., are subject to the requirements of the Federal Records Act and will be handled accordingly. Any questions concerning these guidelines should be raised at the earliest possible time with Barry Roth, Extension 2397.

1. Prior to departure from the President's staff, each staff member should turn over all the papers and other materials in his or her possession to Central Files with the exception of his or her purely personal papers or

materials. Official papers classified Secret and higher, including compartmented intelligence documents, should be turned in to the Staff Secretary. Campaign related materials as well as official materials are to be preserved and deposited in Central Files. To the extent practicable, official and campaign materials should be separated before being sent to Central Files. Papers and materials for Central Files should be placed in storage boxes available for that purpose from Frank Matthews, Ext. 2240, and should be accompanied by an index listing the file folder titles or giving other descriptions of the contents in each box.

Material classified Secret and above being turned in to the Staff Secretary should be placed in boxes or large manila envelopes, securely taped, and accompanied by an unclassified listing of contents on the outside. The box or envelope itself should be clearly marked with the highest level of documents it contains and include the name of the individual or office submitting the material.

2. Purely personal files and materials, including original documents, may be taken by the departing staff member. Such files include correspondence unrelated to any official or campaign duties performed by the staff member; daily appointment records and telephone logs; personal copies of books, pamphlets and periodicials; folders of newspaper or magazine clips; copies of records of a personal nature relating to a person's employment or service; and personal copies of photographs, proclamations, commissions or similar commemorative items. Personal files *do not* include any copies, drafts or working papers that relate to official business or the campaign.

3. A staff member may make a copy or may retain an extra copy of a document which embodies original intellectual thought contributed by the staff member or

any of his assistants, such as the product of research, the notes or drafts of speeches delivered by the staff member, and drafts of proposed legislation; and the copy of any other document written or signed by the staff member that is included in his or her chronological files, along with a duplicate of each related incoming letter or memorndum, may be retained if the original incoming document remains in the Presidential papers; *provided, however,* no copies may be retained of any documents which come within any of the following categories:

(a) Material classified for reasons of the national security under Executive Order 11652;

(b) Restricted data under the Atomic Energy Act of 1954, as amended;

(c) Information supplied to the government under statutes which make the disclosure of such information a crime; or

(d) Memoranda of all types written to the President; other documents that contain recommendations or advice made directly or indirectly to the President; proposed drafts of speeches or statements for the use of the President; schedule proposals to the President; briefing papers used in discussions with the President and records made of such discussions; minutes of meetings of the EPB, ERC, and similar cabinet-level organizations; personnel recommendations or evaluations, and the like.

A staff member who has had access to materials among the Presidential Papers who subsequently needs to inspect them, for his personal use, will be permitted to do so after their accession in the Presidential library, subject to such restrictions as may be generally applicable at the time of the requested inspection.

The cooperation and assistance of each staff member in the collection of such materials is requested. This includes materials not only in your office but those materials pertaining to your official duties which you may have other than at your present office.

In order to assist in the collection of these materials for the President, staff members should begin depositing them in Central Files or with the Staff Secretary, as appropriate, as soon as possible. It is expected that staff offices will deposit all inactive files no later than mid-December and the bulk of any remaining files by January 10. Any offices desiring the assistance of archivists for this purpose should contact Barry Roth who will make the appropriate arrangements.

STATEMENT BY S/PRS, DECEMBER 28, 1976

Secretary Kissinger announced today that he is donating to the United States of America, for preservation at the Library of Congress, the transcribed secretarial notes of telephone conversations during his years in government.

The notes were made as a memory aid and to insure appropriate administrative follow-up, but were not in themselves action documents. They were never circulated, and any action resulting from the conversations would be contained in the administrative follow-up.

Nevertheless, to avoid any misinterpretation during his final days in public office, the Secretary has decided to give the notes at this time to the Library of Congress, as part of the gift to the nation of his personal and public papers which was announced last week. The notes are being donated under a separate deed of gift, because of the significant rights of privacy that may exist for persons who were parties to the telephone conversations. This separate deed of gift incorporates the terms of the original donation. At the end of the time period specified in the original donation, any paper in this group will be available for public access. The sole difference is that if one of the parties to the conversation is still living, his consent must first be secured. A copy of the deed of gift is attached.

DEPARTMENT OF STATE
Washington, D.C. 20520

February 11, 1976

Mr. William Safire
The New York Times
Washington Bureau
1920 L Street, N.W.
Washington, D.C. 20036

Case No. 610050

Dear Mr. Safire:

This is to respond to your request of January 14, 1976, under the Freedom of Information Act, for "information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department."

Your letter specifically refers to telephone conversations that Dr. Kissinger participated in between January 21, 1969, and February 12, 1971, and requests two categories of materials:

1. "all transcripts (including rough drafts, if such exist) in which my name appears."

2. "all transcripts (including rough drafts, if such exist) of conversations between Mr. Kissinger and General Haig, or Mr. Kissinger and Attorney General John Mitchell, or Mr. Kissinger and J. Edgar Hoover, or Mr. Kissinger and any other official of the FBI, or Mr. Kissinger and President Richard M. Nixon in which the subject of 'leaks' of information was discussed."

We have consulted with the Office of the Legal Adviser concerning your letter. That office has been authorized to review the documents that appear to be covered by your request, for the purpose of determining whether such

documents are subject to the Freedom of Information Act. It has advised us of the following:

1. Although your request describes the documents as "transcripts," this description is not entirely accurate. As described in Secretary Kissinger's Responses to Interrogatories in the Halperin litigation, to which your request refers, the documents range from brief and incomplete summaries to detailed or paraphrased accounts of telephone conversations. The documents are in rough draft form and never have been reviewed for accuracy. Your request has been treated as referring to this group of documents.

2. The documents are not subject to the Freedom of Information Act. Both because of the nature of the documents and because of Dr. Kissinger's position at the time the documents were made, they are not records of the Department of State or of any other "agency" and, thus, are not "agency records" within the meaning of the Freedom of Information Act.

3. Even if the documents in question were considered to be "agency records" within the meaning of the Act, they would appear to fall clearly within Exemption 5 of that Act. In addition, other specific statutory exemptions, notably Exemption 1, would be applicable, as would claims of invasion of privacy.

4. Beside falling outside the purview of the Freedom of Information Act, the documents are not contained in any file which is retrievable or indexed by any name or identifying symbol or code; therefore, they are not subject to disclosure under the Privacy Act, 5 U.S.C. 552a.

5. Since this letter is not a denial of a "record" under section 6.6(b) of the Department of State's Freedom of Information regulations (copy attached), the appeal provisions of those regulations (section 6.8) are not technically applicable. However, if you wish to bring additional considerations to the Department's attention or to have a further review made of your request, you may address a letter to the Assistant Secretary of State for Public Affairs, Chairman, Council on Classification Policy, Department of State, Washington, D.C., 20520. Matters presented in such a letter would be given prompt and complete consideration.

Sincerely,

/s/ Barbara Ennis
Barbara Ennis
Director
Freedom of Information Staff
Bureau of Public Affairs

Attachment:
Department of State Freedom
of Information Regulations

DEPARTMENT OF STATE
Washington, D.C. 20520

March 29, 1976

Dear Mr. Safire:

This response is with respect to your letter of February 24, 1976, in which you "appeal the denial of [your] request for information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department."

Your original Freedom of Information Act request of January 14, 1976, seeks two categories of materials from telephone conversations that Dr. Kissinger participated in between January 21, 1969, and February 12, 1971:

1. "All transcripts (including rough drafts, if such exist) in which my name appears."

2. "All transcripts (including rough drafts, if such exist) of conversations between Mr. Kissinger and General Haig, or Mr. Kissinger and Attorney General John Mitchell, or Mr. Kissinger and J. Edgar Hoover, or Mr. Kissinger and any other official of the FBI, or Mr. Kissinger and President Richard M. Nixon in which the subject of 'leaks' of information was discussed.

In the Department's letters of February 11 and March 2, it was indicated to you that since the documents encompassed by your request were not "agency records" within the meaning of the Freedom of Information Act, you were not technically entitled to an appeal under the Department of State's regulations. 22 C.F.R. 6.8. Although we are still of the view that you are not entitled to an appeal, we have employed the same procedures to your request as would be applicable to an appeal.

Your letter of February 24 raises the following points concerning the legal status of the documents encompassed by your request:

1. Your letter asserts that the documents encompassed by your request must be agency records of the Department of State, because they are physically located at the Department of State in the custody of the Executive Assistant to the Secretary who is also a Department of State employee. The Department's Office of the Legal Adviser, however, advises us that the law is clear that the current location of a document does not control the document's status under the Freedom of Information Act, and that documents which are originated in a White House office by a member of the President's immediate staff, such as the President's Special Assistant for National Security Affairs, are not subject to the Act. Senate Report No. 93-1200, at 15 (1974). It should also be noted that the memoranda of telephone conversations have not been preserved as evidence of Department of State business. As indicated in the Department's earlier letter, the Department's Office of the Legal Adviser determined that the documents you seek are not "agency records" within the meaning of the Freedom of Information Act. The Office of the Legal Adviser has again reviewed this issue and has reaffirmed its original view.

2. Having reviewed the documents covered by your request, the Department's Council on Classification Policy has determined that, in the event the documents you seek should be deemed to be agency records, exemption 5 under the Freedom of Information Act would be clearly applicable. It is the Council's view that these documents would be regarded as inter-agency or intra-agency memoranda describing candid working discussions of government officials and others, leading to the formulation of government decisions and policies.

3. Your letter asserts that "an additional claim of invasion of privacy, especially in those matters concerning

this appellant [i.e., yourself], is in error." The Department's Office of the Legal Adviser advises, however, that yours are not the only privacy interests which may be at stake. For example, if a memorandum of conversation mentioned the names of several persons, including yours, privacy interests might be at stake for all of the persons mentioned, as well as for the actual parties to the conversation. If your Freedom of Information Act request turned on the privacy interests of others besides yourself, these interests could not be ignored.

4. Your letter suggests a government official circumvents the Privacy Act "simply by refraining from indexing material that ought to be available to citizens." The Department's Office of the Legal Adviser has indicated to us that the Privacy Act does not require indexing; that it would be incongruous for legislation designed to protect privacy to require government officials to index all documents in their custody, and thereby arm themselves with greater access to information about individual citizens; and that since the documents covered by your request are not contained in any file which is retrievable or indexed by any name or identifying symbol or code, they are not subject to disclosure under the Privacy Act.

In summary, having reviewed your letter of February 24, the Department has concluded that the documents you seek are not subject to disclosure under the Freedom of Information Act because they are not agency records. Even if they were deemed to be agency records, the Council on Classification Policy has determined that exemption 5 under the Freedom of Information Act would clearly exempt these documents from disclosure.

Sincerely,

/s/ John E. Reinhardt
John Reinhardt
Chairman
Council on Classification Policy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs,	)	
v.	)	No. 77-0220
CYRUS R. VANCE, et al., Defendants.	)	

AFFIDAVIT OF WILLIAM SAFIRE

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss.

I, William Safire, being duly sworn, depose and say:

1. I am a plaintiff in the above-captioned action and, by profession, a journalist and author with considerable experience in reporting on the actions of the government and its officials.

2. Prior to 1969, I spent several years working as an author, public relations consultant and reporter. From January 20, 1969 until April 1, 1973, I was a Special Assistant to President Richard M. Nixon. Since leaving that position, I have been employed by the *New York Times*, for which I write a regular column.

3. During my service as Special Assistant to former President Nixon, my primary function was to write

speeches. In that capacity, I had frequent occasion to converse — by phone or in person — with Henry A. Kissinger, who is a defendant in this lawsuit and was Assistant to the President for National Security Affairs during much of the period that I worked at the White House.

4. In the course of my discussions with defendant Kissinger, I learned that it was his regular practice to have government employees monitor or record substantially all of the telephone conversations he had as a public official. I also learned that, subsequent to these conversations, defendant Kissinger had government employees prepare verbatim transcripts of the conversations or secretarial notes that reflected their contents substantially verbatim.

5. In 1971, during a meeting I had with defendant Kissinger, I was shown the transcript of a telephone conversation between defendant Kissinger and a reporter for The Christian Science Monitor. As reflected in the transcript, the conversation concerned an article by the reporter which Mr. Kissinger considered critical of his actions. Upon examining the transcript, I noticed handwritten markings which appeared to represent modifications in the version of the conversation that the transcript contained. The effect of these modifications was to change defendant Kissinger's statements during the conversation so that they reflected greater loyalty by him to then-president Nixon. Based on the discussion I had with defendant Kissinger at the time, it was my impression that defendant Kissinger intended to send the transcript to the then-President and wished to portray his statements to the reporter in a more flattering light.

6. I have published accounts of the above incident on two occasions. The incident was described in my *New York Times* column of January 15, 1976 and in my book *Before the Fall*, which was published by Doubleday in 1975 and recounts my experiences during my years as a White House

Assistant. Both accounts of the incident are attached hereto as Exhibits A and B.

7. The contents of this affidavit are true to the best of my information, knowledge and belief.

/s/ William Safire
William Safire

[Jurat omitted in printing]

EXHIBIT A

[P. 169 From "Before The Fall"
by William Safire
(Doubleday 1975).]

HENRY THE K

The reason why it is logical to assume that the wiretap program had Dr. Kissinger's enthusiastic support, and why his subsequent protestation of distaste rings false, is the operation of his "dead key." All telephone calls to Henry Kissinger, except those few from girl friends, were monitored by a relay of stenographers in his outer office. President Nixon knew his calls were being taken down verbatim whenever he spoke to his national security adviser, and it is a good idea for a record of such calls to exist: when both men know they are being recorded, no moral problem arises. But not many other people who called Dr. Kissinger, and discussed matters in confidence, knew their words were being taken down and in some cases circulated. George Shutlz, when Director of the Office of Management and Budget, was startled to learn from an NSC staffer of the details of a private call he had made earlier that day with Henry. After that, Shultz was guarded in whatever he said to Kissinger on the phone.

Henry would use the surreptitious "telecon" transcripts to prove his loyalty to the President. Complaining to a correspondent about the perfidy of his archrival, Secretary of State Rogers, Henry then edited the transcript, changing words to reflect stronger support of the President by Kissinger, and sent the revised version along to Haldeman — an act of dishonor to the unsuspecting reporter and an act of disloyalty to the President. A man who could do this was capable of eavesdropping on his associates without scruple, and was capable of getting a special thrill out of working most closely with those he spied upon most.

This tolerance of eavesdropping was the first step down the Watergate road. It led to eavesdropping by the plumbers, to attempted eavesdropping on the Democratic National Committee, and to the ultimately maniacal eavesdropping by the President, on the President, for the President, completing the circle and ensuring retribution. Eavesdropping to protect Presidential confidentiality led to the greatest hemorrahage of confidentiality in American history, and to the ruination of many good men. Henry Kissinger was deft in beguiling the Senate Foreign Relations Committee, but he cannot escape history's judgment of the way he watered the roots of Watergate.

In 1969 and 1970, however, Henry Kissinger was not troubled with the morality of the taps, because, for all practical purposes, they were precedented (he thought), legal (he assumed), and would never be discovered (of that he was certain). The mind of Henry the K had comprehensive ability almost equal to Richard Nixon's — that is, it could range the entire horizon, from the creation of grand geopolitical concepts to the manipulation of minute bargaining levers, and then go vertically with the same breath-taking sweep, from niggling little bureaucratic intrigues and tricks to a profound concern for "moral authority," stopping along the way at the pessimistic realism of Oswald Spengler (the author of *The Decline of* . . . .

EXHIBIT B

[New York Times, 1/15/76]

THE DEAD-KEY SCROLLS

By William Safire

WASHINGTON, Jan. 14 — A "dead key", in Washington parlance, is a receiving extension built into a telephone to permit a secretary to listen in to her boss's conversations without the caller suspecting that everything said is being overheard by a third party.

As soon as they entered the White House, and a full two years before the secret Nixon taping system was installed, Henry Kissinger and his deputy, Al Haig, made certain that relays of secretaries on "dead keys" made verbatim notes of all that was said to them over the telephone. The callers — reporters, colleagues, Presidents — were never told that their words were always taken down.

But within the White House it was no big secret aides could see the secretaries outside Henry's door, extensions to their ears, taking shorthand silently.

In 1971, my then-colleague and friend, Henry, showed me the transcript of a conversation with a reporter for The Christian Science Monitor, in which the National Security Adviser chewed him out for a less-than-adulatory article. Since he was planning to send the transcript to President Nixon, the rough draft had "corrections" marked by Mr. Kissinger, adding to the fierce loyalty of his own remarks.

Even with the self-serving emendations, these transcripts are an invaluable, irreplaceable part of the record of the Nixon Presidency, pre-dating as well as paralleling the White House tapes. What has happened to them? The other day, we began to find out.

In a sworn answer to a question submitted to him by Morton Halperin, who is suing Mr. Kissinger for his part in ordering illegal F.B.I. wiretapping, the Secretary of State

writes: "Business telephone conversations from my White House office during this period [Jan. 21, 1969 to Feb. 12, 1971] were usually monitored by my personal secretaries and records prepared, in accordance with routine Government practice, in order to facilitate implementation and follow-up of business transacted."

And where are all his records kept? Appointment books, correspondence, schedules of his White House years, says Mr. Kissinger, have remained where they belong: "All such reocrds, with the exception of the records of my telephone calls, are in the White House. They are in the custody of the N.S.C. [National Security Council] staff. The telephone records are in the State Department, in custody of Mr. Lawrence S. Eagleburger."

Hold on a minute: When Mr. Kissinger left the White House, he left everything behind — "*with the exception of the records of my telephone calls.*" Those are not mere logs of calls, of which he took a copy — those are substantive, verbatim transcripts of conversations, of which he took the only copy. Some questions arise:

1. *When were the dead-key scrolls removed from the White House N.S.C. files?* According to Mr. Eagleburger, within a month after Mr. Kissinger's appointment as Secretary of State in 1973. (But Mr. Kissinger continued as National Security Adviser at that time, and left behind his other N.S.C. files — presumably he wanted to get these supersensitive files out of the White House, fast.)

2. *Under what authority did he take them?* Mr. Eagleburger claims he needed no authority — that these four years of records were considered "working papers that can accompany him wherever he goes, as long as he's in Government." And afterward? "I presume he would leave copies behind, but that's a legal question."

3. *Why didn't he leave the originals where they belonged at the N.S.C. and only take copies, if all he wanted was access to "working papers"?* No answer to that. Did Al Haig

walk off with his telephone transcripts, too? Gen. Brent Scowcroft, the present National Security Adviser, will not return calls on these matters; he has probably offered no objection to having the N.S.C. files denuded of all these transcripts.

4. *Who owns these transcripts?* The Justice Department last week won a decision in the Court of Appeals in which Congressional seizure of the papers of the Nixon Presidency was held constitutional. If N.S.C. transcripts are Presidential papers — as they surely are — then, as of now, they belong to the public and not to Henry Kissinger.

5. *Why have these transcripts never been subpoenaed?* Ah, that's the big one. The Special Prosecutor's investigation of the seventeen wiretaps was a joke; the Senate Foreign Relations Committee look-see was a Kissinger whitewash from start to finish; the Church cover-up committee is afraid of what a subpoena might turn up, and the woebegone Pike committee knows that the House won't back up any subpoena.

One ray of light: By removing the dead-key scrolls from the White House, leaving no copies behind, and by dint of the tacit White House approval of the removal to a Government department, Mr. Kissinger has made his years of conversations subject to the Freedom of Information Act. Citizens may rush in where solons fear to tread.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0391
DEPARTMENT OF STATE, et al., Defendants.	)	

ANSWER OF
DEFENDANT HENRY A. KISSINGER

Defendant Henry A. Kissinger, by his undersigned attorneys, in answer to the Complaint filed herein says:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

Plaintiffs lack standing to maintain this action.

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Complaint, defendant Kissinger admits, denies and otherwise avers as follows:

1. Defendant admits that the action purports to be as

alleged in paragraph 1 of the Complaint.

2. The allegations of paragraph 2 of the Complaint state a conclusion of law to which defendant is not required to respond. To the extent a response is deemed necessary or appropriate, such allegations are denied.

3-4. Defendant lacks knowledge or information sufficient to form a belief as to the allegations of paragraphs 3 and 4 of the Complaint, and accordingly such allegations are denied.

5. The allegations of paragraph 5 of the Complaint state a conclusion of law to which defendant is not required to respond. To the extent a response may be deemed necessary or appropriate, such allegations are denied.

6. Defendant admits that the Department of State is an agency of the United States Government; that Henry A. Kissinger was Secretary of State until January 20, 1977; that Daniel J. Boorstin is the Librarian of Congress; that the documents at issue are held by the Library of Congress; and that James B. Rhoads is the Archivist of the United States. Defendant denies the remaining allegations of paragraph 6 of the Complaint.

7. Defendant admits that a memorandum dated November 11, 1976 was prepared by Monroe Leigh, Esquire, but denies the characterization of the contents of such memorandum set forth in the balance of paragraph 7 of the Complaint.

8. The allegations of paragraph 8 of the Complaint state conclusions of law to which defendant is not required to respond. To the extent a response may be deemed necessary or appropriate, such allegations are denied.

9. Defendant admits that the papers at issue were removed from the Department of State on or about October 29, 1976, and stored in a cleared facility located on private property in the State of New York, and avers that such

records were delivered from that facility to the Library of Congress on or about December 28, 1976. Defendant denies the balance of the allegations of paragraph 9 of the Complaint.

10. Defendant admits that he and Daniel J. Boorstin executed an agreement dated December 24, 1976 relating to the documents at issue and respectfully refers the Court to such document for a statement of its terms. Defendant further admits that he intends to publish his memoirs. The balance of the allegations of paragraph 10 of the Complaint are denied.

11. Defendant admits that the documents at issue were delivered to the Library of Congress between December 27 and December 28, 1976, pursuant to the agreement referred to in paragraph 10 of the Complaint. The balance of the allegations of paragraph 11 of the Complaint are denied.

12. Defendant admits the allegations of paragraph 12 of the Complaint, but respectfully refers the Court to the referenced correspondence for a full and complete statement of contents thereof.

13. The allegations of paragraph 13 of the Complaint state conclusions of law to which defendant is not required to respond. To the extent a response may be deemed necessary or appropriate, such allegations are denied.

Defendant denies each and every allegation of the Complaint not expressly admitted or qualified above.

WHEREFORE, defendant Henry A. Kissinger, having fully answered the allegations of the numbered paragraphs

of the Complaint, prays that the Complaint be dismissed with prejudice and that he be granted his costs.

Respectfully submitted,

/s/ David Ginsburg
David Ginsburg

/s/ James E. Wesner
James E. Wesner

/s/ Martha Jane Shay
Martha Jane Shay

GINSBURG, FELDMAN
AND BRESS
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Attorneys for Defendant
Henry A. Kissinger

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILITARY AUDIT PROJECT, et al., Plaintiffs, v. DEPARTMENT OF STATE, et al., Defendants.	Civil Action No. 77-0391

ANSWER OF DEFENDANTS DEPARTMENT OF STATE, DANIEL J. BOORSTIN AND JAMES B. RHOADS

Defendants Department of State, Daniel J. Boorstin and James B. Rhoads, by their undersigned attorneys, for their answer to the complaint in the above-entitled action, hereby admit, deny and otherwise aver as follows:

First Defense

Plaintiffs lack standing to maintain the action.

Second Defense

James B. Rhoads is not a proper party to the action.

Third Defense

In answer to the numbered paragraphs of the complaint, defendants Department of State, Boorstin and Rhoads admit, deny and otherwise aver as follows:

1. Deny as plaintiffs' characterization of the action.

2. The allegations of paragraph 2 of the complaint are conclusions of law to which an answer is not required but, insofar as an answer is deemed required, they are denied.

3. Deny as an incomplete portrayal of the correspondence referred to in paragraph 3 of the complaint, except to admit that plaintiffs forwarded a letter to the Department of State dated December 28, 1976 that plaintiffs made a second request dated December 29, 1976 and the Court is respectfully referred to the correspondence for the contents thereof.

4. Deny as an incomplete portrayal of the correspondence referred to in paragraph 4 of the complaint, except to admit that the Department of State denied plaintiff's requests by letter dated January 18, 1977 and that plaintiffs appealed the denial and that the denial was denied on March 4, 1977.

5. Admit.

6. The allegations of paragraph 6 of the complaint are conclusions of law to which an answer is not required, but insofar as an answer is deemed required, they are denied, except to admit that defendant Department of State is an agency and that defendant Henry A. Kissinger was Secretary of State until January 20, 1977 and that defendant Daniel J. Boorstin is the Librarian of Congress and that the transcribed secretarial notes of the phone conversations at issue are held by the Library of Congress and that defendant James B. Rhoads is the Archivist of the United States.

7. Deny as an incomplete portrayal of the memorandum referred to in paragraph 7 of the complaint, except to admit that the Legal Advisor of the Department of State at the time, Monroe Leigh, Esq., prepared a memorandum dated November 11, 1976.

8. The allegations of paragraph 8 of the complaint are conclusions of law to which an answer is not required, but insofar as an answer is deemed required, they are denied.

9. The allegations of paragraph nine of the Complaint are conclusions of law to which an answer is not required,

but if an answer is deemed required, they are denied except to refer to defendants' answer to paragraph six of the Complaint.

10. Deny as an incomplete portrayal of the documents to which reference is made in paragraph 10 of the complaint, except to admit that a Deed of Gift and Agreement, dated December 24, 1976, was executed by defendants Henry A. Kissinger and Daniel J. Boorstin, to which the Court is respectfully referred for a full and complete statement of its provisions.

11. The allegations of paragraph 11 of the complaint are conclusions of law to which an answer is not required, but insofar as an answer is deemed required, they are denied, except to admit that the documents, described in paragraph 6, above, at issue have been physically placed in the Library of Congress.

12. Deny as an incomplete portrayal of an exchange of correspondence and aver that the Archivist of the United States forwarded a letter to defendant Kissinger dated January 4, 1977 and then Legal Adviser of the Department of State Monroe Leigh prepared a memorandum dated January 14, 1977 which discusses the January 4, 1977 letter, to both of which the Court is respectfully referred for a full and complete statement of the contents thereof.

13. The allegations of paragraph 13 of the complaint are conclusions of law to which an answer is not required, but insofar as an answer is deemed required, they are denied.

14. Deny as plaintiffs' characterization of the relief they seek.

Defendants deny each and every allegation of the complaint not expressly admitted or qualified above.

Defendants deny that plaintiffs are entitled to the relief sought by the complaint or to any relief whatsoever.

WHEREFORE defendants pray that the action be dismissed with prejudice and the defendants be granted their costs.

Respectfully submitted,

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

/s/ Irwin Goldbloom
IRWIN GOLDBLOOM
Deputy Assistant Attorney General

/s/ Jeffrey Axelrad
JEFFREY AXELRAD

Attorney, Department of Justice
Washington, D.C. 20530
Tel: 202-739-3300

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants	)	

AFFIDAVIT OF HENRY A. KISSINGER

HENRY A. KISSINGER, being duly sworn, deposes and says:

1. I am one of the defendants in the above-captioned action. This affidavit states facts within my own knowledge, and is given in support of my Opposition to Plaintiffs' Motion for a Preliminary Injunction.

2. Plaintiffs have suggested that now or in the future I may remove, conceal, misplace, edit, destroy or otherwise injure the telephone transcripts at issue in this case while they are in the possession of the Library of Congress. The suggestion is offensive and false. I donated the notes, together with documents relating to my years in government and earlier periods of my life, to the Library of Congress for the specific purpose of assuring their preservation for future historical purposes. I have altered none of the notes; I have removed none of them; I have not disturbed their arrangement in the files where they are kept; I have no intention of doing so.

3. I have read the regulations of the Library of Congress relating to the use of rare manuscript materials. I have signed the Reader's Agreement relating to compliance with such rules that was supplied to me by the Library of Congress. I am bound by the regulations and agreement, and will abide by them.

4. The facility where the notes are kept at the Library of Congress consists of a storage area and a working area. When I or my assistants visit this facility, we remain in the working area. Files containing the notes are brought to us by a Manuscripts Division staff employee, and reshelved by this employee. An employee is always present in the facility while we are there. We do not ordinarily bring brief cases or other similar items with us to the facility. I am aware that the Library's rules authorize a search of brief cases and like items, and would not object if any such request were made.

5. The Affidavit of William Safire attached to Plaintiffs' Motion for Summary Judgment and, Alternatively, A Preliminary Injunction, refers to a 1971 incident in which Mr. Safire says he was shown a transcript of a telephone conversation between myself and a newspaper reporter that contained handwritten markings appearing to represent modifications of the version of the conversation contained in the transcript. Mr. Safire further states it was his impression that I intended to send the altered transcript to then-President Nixon, and implies that the alterations were designed to portray the contents of the conversations in a more flattering light than would have been the case had the alterations not been made.

6. I have no recollection of the incident described by Mr. Safire. However, Mr. Safire's affidavit is inconsistent with my recollections concerning the manner in which the notes were stored and used. The notes are rough transcriptions of telephone conversations which were stored in my personal files at the offices where I worked while in government. I

did not edit them as they were prepared or at any other time. I read a very few of the transcripts in connection with testimony or legal cases; the remainder, the great bulk of the transcripts, I never read before they were transferred to the Library of Congress.

7. I intend to publish memoirs relating to my years in government. The earliest possible publication date would be the latter part of 1979.

/s/ Henry A. Kissinger
Henry A. Kissinger

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants.	)	

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0391
DEPARTMENT OF STATE, et al., Defendants.	)	

DEFENDANT HENRY A. KISSINGER'S
STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO
GENUINE ISSUE TO BE TRIED

Pursuant to Rule 1-9(h) of the Rules of the United States District Court for the District of Columbia, defendant Henry A. Kissinger submits the following Statement of

Material Facts as to Which There Is No Genuine Issue to Be Tried. The portions of the record which support each paragraph in the Statement are contained in the Second Affidavit of Henry A. Kissinger and Affidavit of Monroe Leigh, attached hereto, and in the pleadings and admissions on file herein.

1. Defendant Kissinger served in the White House as Assistant to the President for National Security Affairs from January 20, 1969 until September 22, 1973. From September 22, 1973, until November 3, 1975, he served both as Assistant to the President for National Security Affairs and as Secretary of State. After September 22, 1975 and until January 20, 1977, he was Secretary of State. Second Kissinger Affidavit, ¶ 2.

2. During the foregoing period of defendant Kissinger's government service, secretaries monitored his telephone conversations and took shorthand notes of what was said. Transcriptions of these notes were made and filed in defendant Kissinger's personal files. Second Kissinger Affidavit, ¶3.

3. Defendant Kissinger caused the notes to be made in order to create a rough record of his daily telephone conversations to which he or his immediate staff might refer to follow up on matters discussed orally. The notes were used by his executive secretary to prepare his appointments schedule. They were also read by his Senior Special Assistant to keep abreast of his oral discussions. They were used for no other purpose. Second Kissinger Affidavit, ¶¶ 3, 4.

4. The notes reflect the vast majority of defendant Kissinger's telephone conversations without regard to subject matter or the identity of the other party. They contain details of conversations with friends, legislators, journalists, diplomats, other government officials, Presidents Nixon and Ford, scholars, and others. They are not limited to discussions of official business, but include purely personal

discussions and conversations of a mixed character in which business and personal matters were intermingled. Second Kissinger Affidavit, ¶ 5.

5. Defendant Kissinger regarded the telephone notes as work aids which he could retain or discard as he chose. The notes were not filed among the official records of any agency, but were stored in personal files located in defendant Kissinger's office. They were not circulated outside his office, and only he and his immediate personal staff had access to them. The notes were not edited as they were made, or at any other time, for accuracy and completeness, or to separate personal from official matters. Second Kissinger Affidavit, ¶ 6.

6. Had defendant Kissinger believed the telephone notes would be treated as official records he would have edited them or not made them at all. Given the amount of time required for editing, he probably would not have made or kept the notes. *Id.*

7. The notes are rough memoranda which vary in quality according to the skill of the secretary who made them. Some are substantially verbatim, but others are only rough approximations of what was said. Many contain misspelled names, omissions, garbled passages, and outright errors of transcription. Second Kissinger Affidavit, ¶ 17.

8. Near the end of his term, defendant Kissinger decided to donate his personal papers and copies of official State Department documents upon which he had worked to the Library of Congress. The terms of the donation are stated in a First Deed of Gift and Agreement, dated November 12, 1976, and a Second Deed of Gift and Agreement, dated December 24, 1976. The telephone notes at issue in this litigation are covered by the Second Deed of Gift and Agreement. Second Kissinger Affidavit, ¶ 7; RCFP

Complaint,* Exhibits A and C.

9. The procedures employed in obtaining State Department clearance for the proposed donation are set forth in a Donation Procedures Memoranda, dated November 11, 1976, attached to the Second Kissinger Affidavit. This memorandum was reviewed and approved by Monroe Leigh, the Department of State's Legal Adviser; by Lawrence M. Eagleburger, the Deputy Undersecretary for Management; by John Thomas, the Assistant Secretary for Administration; and by John Pruden, the Director of the Department of State's Documents Center. Second Kissinger Affidavit, ¶ 9; Leigh Affidavit, ¶ 6.

10. The Donation Procedures Memorandum stated that the proposed storage facility at the Library of Congres had been approved by the Department of State's Office of Security (¶ 6), and provided: (1) that defendant Kissinger's working files would be reviewed by Department of State records officers to assure that they contained no original Departmental records (¶ 2); (2) that any personal papers of defendant Kissinger found in the working files would be returned after extracts had been made of official matters contained in the personal papers (¶ 3); and (3) that defendant Kissinger was entitled to retain papers that had been designated and filed as personal from their time of origin or receipt (¶ 5). All of the persons signing the memorandum knew that the telephone notes were included among defendant Kissinger's personal files. Leigh Affidavit, ¶ 7.

11. The State Department's Legal Adviser orally advised defendant Kissinger in early 1976 that the telephone notes were not State Department records, but rather were his pesonal papers which he would be free to retain when he left office. This oral advice was subsequently repeated on a number of occasions thereafter. The substance of the advice is contained in a Memorandum, dated November 11,

*"RCFP Complaint" refers to the amended complaint filed by the plaintiffs in No. 77-0220 herein.

1976, addressed by the Legal Adviser to defendant Kissinger. Second Kissinger Affidavit, ¶ 11; Leigh Affidavit, ¶¶ 2 through 5; RCFP Complaint, Exhibit B.

12. On October 29, 1976, acting in reliance on the oral advice given to him by the Department's Legal Adviser, defendant Kissinger caused the telephone notes to be transferred from his office at the State Department to a vault located on the estate of then Vice President Rockefeller at Pocantico Hills, New York. Second Kissinger Affidavit, ¶ 12.

13. Also acting pursuant to the advice of the Department's Legal Adviser, defendant Kissinger requested the Deputy Undersecretary for Management to review the telephone notes to determine whether any discussions contained in the notes should be extracted and filed as official records. Defendant Kissinger's instructions to the Deputy Undersecretary were that he should read all the telephone notes, including those from the White House period, and extract everything he believed was necessary in order to comply with the regulations and with the Legal Adviser's advice. The extracts were subsequently made and filed with the State Department and the National Security Council. Second Kissinger Affidavit, ¶ 6.

14. On December 28, 1976, the telephone notes were removed from Pocantico Hills and delivered to the Library of Congress. Second Kissinger Affidavit, ¶ 16.

15. The Second Deed of Gift and Agreement, which applies to the telephone notes, restricts public access to the notes during the lives of both parties to the conversations reflected therein. RCFP Complaint, Exhibit C. Defendant Kissinger concluded that this restriction was necessary in order to protect not only his own privacy but the privacy of the persons with whom he spoke. Second Kissinger Affidavit, ¶ 15.

16. On December 28, 1976, the Military Audit Project and its director filed a Freedom of Information Act request with the Department of State seeking access to all of the

telephone notes. MAP Complaint, * ¶ 3. This request was finally denied by the State Department on March 4, 1977. *Id.*, ¶ 4.

17. The Reporters Committee for Freedom of the Press and others filed a Freedom of Information Act request seeking access to all the notes on January 13, 1977. RCFP Complaint, Exhibit H. This request was denied by the Department of State on January 28, 1977. *Id.*, Exhibit I. In its letter of denial, the Department of State informed plaintiffs that extracts had been made from the telephone notes and filed with the Department's records.

18. Plaintiff William Safire's Freedom of Information Act request was filed with the Department of State on January 14, 1976. RCFP Complaint, Exhibit F. Unlike the other request, plaintiff Safire's request sought access only to notes of telephone conversations in which his own name appeared or in which defendant Kissinger and certain other designated individuals discussed the subject of "leaks." Plaintiff Safire's Freedom of Information Act request was finally denied by the Department of State on March 29, 1976. *Id.*, ¶ 46. He did not further press his Freedom of Information Act claims until this litigation began.

Respectfully submitted,

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June 17, 1977

*"MAP Complaint" refers to the complaint filed herein in No. 77-0391.

APPENDIX II

DEPARTMENT OF STATE
Washington, D.C. 20520

Memorandum to the National Study Commission on Records and Documents of Federal Officials

This memorandum will describe the practice of the Department of State with respect to the treatment and disposition of papers in the custody of senior officials at the time they retire from office.

Policies

The practice of the Department of State, as well as existing legal authority on the ownership papers held by senior officials, take into account five policy considerations:

1. The overriding need of the Department to retain a complete record of the Department's business and decisions.

2. The need to protect the confidentiality of diplomatic correspondence, intelligence and other national security information, and papers reflecting internal discussions of foreign policy alternatives.

3. The right of a government employee to retain papers of a personal nature or those prepared with the expectation of privacy — e.g., personal correspondence, private diaries.

4. The need of former senior Department officials to have access to their files after retirement, in order to defend their reputations or their conduct in office or to prepare memoirs that will add to the history of a given period.

5. The rights of historians and the public to have

access to appropriate papers. The latter rights are well defended by the Freedom of Information and Privacy Acts.

The foregoing policies, of course, are not always mutually consistent; but the Department attempts to follow practices that take several of these policy considerations into account while protecting the needs of government.

Legal History

Prior to 1950, there were no laws or regulations on what papers a senior official could take with him upon retirement from office. In 1950, Congress passed the Federal Records Act, 44 U.S.C. 3101-3107. It prescribed standards for the maintenance and control of official documents, and required the head of each agency to "establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Administrator of General Services."

The Federal Records Act of 1950 relied in part on an earlier statute, the Records Disposal Act of 1943, 44 U.S.C. 3301-3314. In the 1943 Act, the term "record" is defined as including all papers which both (1) were "made or received by an agency of the United States Government under federal law or in connection with the transaction of public business," and (2) have been "preserved or [are] appropriate for preservation . . . as evidence of the policies, decisions, . . . or other activities of the government or because of the informational value of data contained in them." 44 U.S.C. 3301.

Although this legislation provided some general guidance for distinguishing government records from private papers, it was not very explicit. For this reason, the Eisenhower Administration undertook a major study which culminated in a Cabinet Paper dated July 27, 1959, (Tab 1). This Cabinet Paper gives specific guidance and attempts to accommodate many of the policy considerations discussed

above. For example, it states as a general policy that documents not be withdrawn if their withdrawal will "create such a gap in the files of an agency as to disrupt the proper documentation of its activities. . . ." At the same time, however, it provides that personal work aids (e.g., office diaries) that contain information already reflected in actual agency records, can be removed, provided confidential government information is not involved.

Since the 1959 Eisenhower Cabinet Paper, there have been no authoritative standards on the removal of papers which have been applicable to the government at large. The problem, however, has come up in a peripheral way. For example, in July 1975, OMB prepared guidelines on what papers are to be considered "agency records" under the Privacy Act. Although the OMB guidelines are not concerned with retiring officials, they do mention categories of papers which are to be deemed personal:

> "Uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and under which the agency exercises no control or dominion (e.g., personal telephone lists) are not considered to be agency records. . . ." (40 F.R. 28952).

At least one court decision under the Freedom of Information Act expresses a similar view — that where a paper is retained by its author and is not circulated within an agency, it is not an agency record. *Porter County Chapter v. Atomic Energy Commission*, 380 F.Supp. 630 (1974).

The Nixon papers litigation may provide guidelines. A lower court has determined that former President Nixon did not own papers "generated, created, produced or kept in the administration and performance of the powers and duties of the Office of the President." *Nixon v. Sampson*, 389 F.Supp. 107, 145 (1975). This decision, however, is subject to further court review.

Other court decisions of the past 30 years on this problem include *United States v. First Trust Co. of St. Paul*, 251 F.2nd 686 (1958), *Public Affairs. Associates Inc., v. Rickover*, 268 F.Supp. 444 (1967), and *In Re Roosevelt's Will*, 73 N.Y.S.2d 821 (1947).

Department Practice Before 1960

Prior to 1960, it was not uncommon for retiring Department officials to remove large numbers of official documents, particularly extra copies of documents. Many of these officials may have relied on the so-called "extra copy" exception. Under 44 U.S.C. 3301, "extra copies of documents preserved only for convenience of records" are not considered to be government records. Although an "extra copy" of a government record may not itself be a "government record" in a technical sense, this does not end the inquiry. One must also consider whether the government has a proprietary interest in the information contained in the extra copy — particularly where classified information is involved. Thus, the 1959 Eisenhower Cabinet Paper on removal of papers states that "whether or not a Department official may take extra carbons or non-record copies of records should depend largely on whether there is any policy or legal reason why the information contained in them should be regarded as confidential."

It appears that former Department officials who took extra copies and other papers with them upon retirement placed these papers in private institutions which had obtained appropriate security clearances from the government. A list of some of these collections appears at Tab 2. Apart from those mentioned in the list, we note that Christian Herter donated copies of his papers to Eisenhower Library. John Foster Dulles had numerous papers microfilmed at his own expense and deposited the microfilm in an approved security area at Princeton University.

Current Department Regulations

In 1960, pursuant to guidelines in the Eisenhower Cabinet Paper, the Department issued a Foreign Service Circular concerning the disposition of papers in the custody of departing foreign service officers. Subsequently, the Department's regulations were amended to reflect the recommendations in the circular, and these regulations as amended are codified at 5 FAM 400 *et seq.* (Tab 3).

In 1967, Secretary Dean Rusk asked the Legal Adviser to determine if existing laws and regulations were adequate to ensure that the Department retained in its possession a complete record of the Department's business and decisions. As a result of this study, the Department's regulations were further strengthened. It should also be noted that Secretary Rusk personally encouraged senior officials to leave all official records in the custody of the Department.

Certain provisions of the Department's regulations on records (Tab 3) deserve special note. Under 5 FAM 417.1, it is assumed that unless a paper "in an employee's office" has been "explicitly designated or filed as personal at the time of origin or receipt," the paper is a Department record which cannot be removed without the approval of the Director of the Department's document center. This regulation is to encourage Department employees and officials to segregate official from personal materials from the time a document is originated.

As indicated in 5 FAM 417.2, every departing official is required to execute a separation statement (Tab 4), in which the departing official attests that he has not removed official records or other documents that contain classified information. Under 5 FAM 417.3, provision is made for retiring officials to apply to have certain papers declassified for the purpose of removal from the Department.

Thus, the Department's regulations take several policy considerations into account. First, they attempt to maintain

exclusive control over all records of Department business, as well as copies of records which contain classified information. Second, papers designated or filed as "personal" at the time of origin or receipt are presumed to be papers in which the individual has the dominant interest — and thus may retain. If a paper has *not* been treated as "personal" from the start, it will be deemed a government document, with one exception. This exception is where the Department's document center reviews a paper, finds that it contains personal matter, and approves its removal. See 5 FAM 417.1(b).

Third, even if a paper has been filed as personal or contains personal matter, Department employees are required to extract, and to make a part of the officials records, portions of the paper which discuss official policy matters. See 5 FAM 417.1(b) and 432. In practice, this extract requirement is applied to papers containing a discussion of Department activities or decisions not otherwise reflected in existing Department records. In other words, until such official material is extracted for the Department's records, the Department has a predominant interest in the paper that is otherwise personal.

Fourth, irrespective of whether official matters have been extracted from a paper containing personal material, the Department has a predominant interest in the storage of a paper containing classified information. The Department has final authority over how and where *all* papers held by Department employees and containing classified information are kept. To help assure such control, the Department has developed a "senior official" rule, to which we now turn.

Access by Senior Officials

One of the major inducements the Department uses to ensure that records are not removed is to provide retired senior officials access to their files for as long as such access

is desired and the former official's security clearance is maintained. This access is provided under 5 FAM 946, which was promulgated pursuant to section 12 of the Executive Order 11652 (see Tab 3).

Under this "senior official" rule, the Department stores the papers used by a former official in so-called "VIP" files, which are kept as a single collection bearing the former official's name. These files are deemd to be a part of the central files that is merely segregated. With respect to lower level officials, their files of interest are usually maintained as part of the inactive materials retired from individual Department bureaus or foreign service overseas posts.

The "senior official" rule began in practice in 1960, when retiring officials were encouraged to leave their files to the Department or to deposit them with a Presidential library. Secretary of State Rusk was one of the first officials whose files were placed in a separate storage area in the Department. Secretary Rogers' files are also stored in this manner.

With the exception of a former Assistant Secretary for African Affairs, no senior official since 1960 has been authorized to remove his files and to store them outside the Department. Conceivably, in a case of unusual need, files could be stored in a secure storage area outside of the Department, provided (a) the applicable security requirements were satisfied and (b) the friles to be transferred contained only copies of records and not the actual records on which the Department must rely. Such removal of copies of records in cases of special need is contemplated in the 1959 Eisenhower Cabinet Paper. In construing the predecessor of section 12 of Executive Order 11652 (*viz.* Executive Orders 10501 and 10816), it states:

> "[This section] does not permit the removal of classified records from the possession of the Government, but the agency head concerned may,

in his discretion, permit persons granted access to classified information under the new subparagraph to acquire or reproduce, and retain in the custody, extra copies of those classified records if those persons arrange for the proper safeguards thereof. The agency head involved shall assure that title to the copies will remain in the United States until such time as the information contained therein has been officially declassified under the provisions of Executive Order No. 10501 and until the agency head otherwise determines that the interests of the United States permit the transfer of title to the copies to nongovernmental custodians."

The Department believes that its "senior official" rule should be continued. It assures the Department of control over all necessary records while providing access to former officials who are writing memoirs or who must defend, or give information concerning, their activities in office.

Historical Review

All Department records, including files of senior officials, are reviewed by the Department's historical office at about 20 years from the date of origination. For example, in about 1980, Department historians will review all Department records dating from 1960, with a view to publishing any documents that can then be declassified. Documents of historical value that can be declassified are then published in the Department's multi-volume work, *Foreign Relations of the United States.*

Once this historical review is complete, original documents from the period under review would be transferred to the National Archives. Restrictions would be maintained on documents which could not be declassified. With respect to the collected files of senior officials, these would probably be transferred to the National Archives as

single collections approximately 20 years following the official's retirement from office. Thus, if an official retired in 1969, his files might be transferred to the National Archives in about 1989.

Public Access

Apart from information contained in the Department's publications (Tab 5), both historicans and the public at large may seek access to documents under the Freedom of Information and Privacy Acts. The Department in 1975 received 1,812 Freedom of Information Act requests. It granted 770 in their entirety and 290 in part; 126 were denied in full (see Tab 6). The Department has determined that these requests resulted in a financial burden on the Department of approximately $1 million in direct labor costs alone (see Tab 7).

Problem Areas

1. The Department's success in maintaining control over records held by senior officials has depended more on persuasion and good faith than on compulsion. Indeed, apart from the extreme step of informing the Department of Justice of a possible criminal violation under 18 U.S.C. 641 or 2017, there is no enforcement mechanism available. As in most agencies, the records officer of the Department cannot formally compel compliance by senior officials.

Nevertheless, the information compliance procedures in the Department have been very successful. Persons in positions of responsibility invariably act in good faith when advised of the applicable laws and regulations. However, the Commission might consider what further procedures and safeguards should exist for the rare case of disagreement as to what papers can be removed.

2. A comprehensive set of rules for distinguishing personal from official papers needs to be fashioned for the en-

tire government. At present, the rules appear to vary from agency to agency. To fashion a set of rules, one must identify and consider each of the interests at stake in various categories of paper — i.e., personal correspondence containing official material, personal letters mixed with official files, extra copies of official records, papers as to which expectations of privacy exist (e.g., a personal diary discussing one's personal involvement in government activities). No simple formula could take into account all of the policy considerations mentioned at the beginning of this memorandum.

3. Further study is needed concerning the classification and declassification of government information. At present, an NSC review group is considering this problem in the context of a possible revision of Executive Order 11652. Perhaps the Commission should await the outcome of the NSC review before deciding whether to include this problem in its investigation.

Records of Former Senior Officials
in the Possession of
Private Institutions

Hoover Institute for War and Revolution
Stanford, California

Princeton University
Dulles, Stevenson

Delaware University
Messersmith

University of Virginia
Stettinius

University of Michigan
G. Williams (thru FADRC)

Library of Congress
C. Hull

Harvard University
Grew

Clemson University
Sec. Burns

APPENDIX III

GENERAL SERVICES ADMINISTRATION

Aug 2 1976

Honorable Herbert Brownell
Chairman, National Study Commission on
Records and Documents of Federal Officials
Room 1127
Department of Justice
Washington, DC 20530

Dear Mr. Brownell:

Thank you for your letter of June 13, 1976, regarding the control, preservation, and disposition of records by GSA officials. Responses to your questions are provided below:

a. *Policies.* GSA has established its policy for the maintenance and disposition of all GSA records in the GSA Policy Manual, 2-86 (ADM P 1000.2B) (see Enclosure 1). This policy is implemented by the handbook, GSA Records Maintenance and Disposition System (OAD P 1820.2). Relevant chapters are included in Enclosure 2.

(1) The GSA records system provides for the maintenance of disposition of all GSA records, including those of senior officials. It is a functional files system which requires the maintenance of official files to document GSA functions and programs at the office level where the particular function or program is being performed. For instance, maintenance and disposition of supervisory or singatory officials' files, including the Administrator's official files, are provided for in Appendix D of chapter 9 of OAD P 1820.2 (see Enclosure 2).

(2) The need to protect the confidentiality of sensitive information is provided for retired records by the GSA records system. A senior GSA official has responsibility for the current records which document the function for which he is responsible. Therefore, he controls access to those

records. He is also responsible for the protection of sensitive information contained in such records, according to GSA Order OAD 1800.1, Safeguarding privileged and sensitive nondefense information (see Enclosure 3). GSA continues to control access to its records maintained in Federal records centers for as long as the records exist.

(3) Senior officials may maintain personal records separately from official files and may remove them when they retire from office. However, if they are personal records they are not subject to the Privacy Act of 1974. Therefore, when such files include personal information on other individuals there is no guarantee of personal privacy.

(4) To our knowledge, former GSA senior officials have never requested access to their files after leaving office. If the GSA Records Officer were to receive such a request, he would ask for the approval of the incumbent official responsible for the records. Also, such access is subject to GSA Order ADM 7900.3, GSA regulations pursuant to "Freedom of Information Act" (Enclosure 4), and GSA Order ADM 7900.4, GSA regulations implementing the Privacy Act of 1974 (Enclosure 5).

(5) Any requests from the public and historians are also subject to the requirements cited in subparagraph (4) above.

b. *Internal agency regulations and procedures.* Internal agency regulations and procedures for identifying, maintaining, and disposing of records are provided for in the handbook, GSA Records Maintenance and Disposition System (OAD P 1820.2). This functional files system is designed to cover all official files of GSA, including those of senior officials.

c. *Access to agency records.* All requests for access to agency records are limited by the following listed GSA regulations and they apply to all present and former employees, including senior officials. They also apply to

private citizens and private sector organizations.

(1) GSA Order, Safeguarding privileged and sensitive non-defense information (Enclosure 3).

(2) Handbook, GSA Records Maintenance and Disposition System, Figure 4-2 (Part 2 of 3) of chapter 4 for retired records (Enclosure 2).

(3) GSA Order, GSA regulations pursuant to "Freedom of Information Act" (Enclosure 5).

(4) GSA Order, GSA regulations implementing the Privacy Act of 1974 (Enclosure 4).

d. *Summary of implementation of the Privacy Act of 1974.*

(1) The following is a summary of GSA actions to implement and administer the provisions of the Privacy Act of 1974 (5 U.S.C. 552a).

(a) A GSA Privacy Board was established in March 1975 to provide the attention and support of top management to ensure that information practices followed in GSA were consistent with the overall goal of protecting the individual's right to privacy, and to develop and maintain a privacy action plan for attaining this goal. Membership on the Board included the Head of each Service and Staff Office and the Administrator of Region 3 to represent the Administrators of the 10 GSA regions. In October 1975 the Board concluded that they had completed their mission since the Privacy Act had been successfully implemented throughout GSA. The Board was then abolished and the Director of Administration was assigned the responsibility of administering the Privacy Act within GSA. In addition, a Privacy Act Officer and Alternate Privacy Act Officer were designated within each of the services, staff offices, and regions to assist Heads of Services and Staff Offices and Regional Administrators in overseeing administration of the act within their assigned areas of jurisdiction.

(b) A GSA Privacy Action Plan was developed to accomplish the inventorying of all systems of records, preparing notices for the Federal Register, training employees, publishing Agency rules, revising Agency internal administrative procedures, and initiating physical security controls.

(c) The cost of implementing the Privacy Act within GSA during fiscal year 1976 has been estimated at $1.1 million which included personnel costs of $917,000 for 89,000 man-hours, $115,000 for supplies, equipment, space, and $77,000 for printing. GSA has established a GS-13 position to coordinate the implementation of the Privacy Act.

(2) GSA has reported 90 systems of records subject to the provisions of the Privacy Act. As the major portion of these systems of records contains information only on GSA employees, there has been little noticeable effect by GSA's implementation of the act upon the general public.

(3) Except for the Office of Investigations, offices throughout GSA have reported that generally there has been no change in the quality or quantity of information available to make program decisions, no improvement or decline in response rates to questionnaires, no change in the quality or completeness of responses, and no change in the willingness of third parties to respond to requests or to request pledges of confidentiality. The Office of Investigations has reported several instances where individuals have been reluctant to complete personal history statements. There has also been a marked increase in the number of third parties who refuse to respond to requests for information on another individual, particularly from educational institutions, police authorities, and employers.

(4) As appropriate routine uses were included in the GSA notices of systems of records to permit transfers of information for purposes compatible with the purpose for

which the information is collected, there has been little effect on disclosures from agency records to the public and to State and local governments. Any limitations have usually occurred with respect to credit agencies and prospective employers.

(5) Most of the GSA's systems of records are employee oriented. These records were generally available to the employee prior to implementation of the Privacy Act. No statistical records were kept either prior to or after the implementation of the Privacy Act on the number of access requests to most systems of records. Many of the records constituting part of a system of records are records continually in use during the week, such as time cards. To create a statistical record of the number of employee access requests to these types of records would create a burdensome system. Therefore, the following statistical information on access requests does not include those oral requests an employee makes for access to his records which are maintained in his immediate working area:

(a) During the period from September 27, 1975, to December 31, 1975, there were an estimated 3,406 requests for access to nonexempt systems, primarily to employees' personnel folders, and 19 requests to exempt systems.

(b) The current level of requests is essentially the same as that experienced prior to the effective date of the act. There was a surge of requests initially after the effective date of the Privacy Act, but this has now leveled off.

(6) Generally there has been an increase in the workload of maintaining and servicing records and in paperwork due to the use of separate Privacy Act statements in conjunction with solicitation forms. In addition, the following specific effects were noted:

(a) The Office of General Counsel reported a large increase in the areas of counseling other services and staff offices;

(b) The Office of Investigations reported they were finding in the investigatory process an ever increasing reluctance on the part of persons interviewed to provide information concerning another individual and that their experience has shown that people, when interviewed, are inclined to provide only favorable information;

(c) The Automated Data and Telecommunications Service reported that they have spent a considerable amount of program time in consulting with and assisting customer agencies in implementing the provisions of the Privacy Act; and

(d) The National Archives and Records Service issued publication guidelines for the Privacy Act of 1974 to assist agencies in implementing the Privacy Act and arranged to publish all public notices in the Federal Register.

e. *Summary of the implementation of the Freedom of Information Act.* GSA Order ADM 7900.3, GSA Regulations Pursuant to "Freedom of Infomation Act," was revised February 21, 1975, to incorporate the Freedom of Information Act Amendments of 1974.

(1) The Information Division, Office of Public Affairs, Office of the Administrator, and the Offices of Business Affairs in each of the 10 regions have been designated as coordinators of Freedom of Information (FOI) requests. The office in possession of the information requested provides responses to inquiries while the coordinating offices serve as expeditors and control points. The Director of Information is the GSA Freedom of Information Officer. He processes FOI appeals on behalf of the Deputy Administrator, who has final denial authority.

(2) The 1974 amendments have had a considerable impact on the manhours devoted to FOI matters. During the calendar year 1975 GSA received 2,713 FOI requests which

cost $34,422 to process. Of these requests, 73 were denied. No additional personnel have been employed to process the growing FOI burden; however, there is a continuing effort to develop expertise among the employees who handle such requests.

f. *Problem areas.*

(1) There is no established government-wide definition of personal records. Official GSA records are identified by the GSA records system. Personal records are presently considered to be simply those records which are not official. However, some records may contain both personal and official information in the same correspondence. Also, it is not certain whether extra information copies of official records which a GSA employee may keep in his files may be considered personal. Agency records officers need a definition of personal records to enable them to provide adequate assistance to senior officials.

(2) Compliance with GSA regulations regarding maintenance, protection, and disposition of records by senior officials is ultimately the decision of the senior official himself. The GSA Records Officer, as his subordinate, can inform the official of GSA regulations and procedures concerning official records. Senior officials are generally very willing to comply. The Records Officer does not know whether a senior official has placed all his official records in the official file. It is possible that the official may be the only individual who knows of the existence of a record. Government-wide regulations and procedures might be effective in ensuring maintenance and protection of official records at this level.

Sincerely,

/S/G.C. Gardner
G.C. GARDNER
Director of Administration

Enclosures.

DEPARTMENT OF DEFENSE

PAPERS OF TOP OFFICIALS

Interim Report by the Department of Defense

In accordance with the conclusions reached at the March 11 meeting of the Public Documents Commission, key components of the Department of Defense were asked to report on current regulations, policies, and procedures affecting their records management programs. The purpose of the reports was to provide background information for the Commission's staff on existing practices as well as information on the handling of the papers of top officials — one of the major concerns of the Commission. While the reports themselves, supplemented by extensive documentation, are being forwarded to the Commission's staff,a preliminary summary of the information on the handling of the papers of top officials might be appropriate.

Presidential civilian appointees are briefed upon assuming office in the statutory provisions relating to "official records" and on the importance of keeping separate files for personal and official papers. They are told that the removal of classified documents or those pertaining to public business is prohibited by law, but that diaries, logs, memoranda of personal telephone calls, etc., which do not contain reference to official business, belong to the statutory official as personal or private material and may be removed. They are warned that the very nature of the job and the background of the statutory appointee often result in correspondence of a mixed character and that in such cases all official material should be excerpted from the personal correspondence and made a part of the official file. This information is provided in the personal briefing book prepared for each statutory appointee and is sometimes supplemented by oral briefings of the appointee or members of his staff.

While in office, statutory appointees are usually supported by continuing administrative offices, which make copies of incoming papers, except for those addressed personally to these officials, and retain these copies in the "central files" of the respective offices.

Upon leaving office, practically all Presidential appointees have no difficulties in identifying their personal or private papers, since they have been kept in separate files during their incumbency. In some cases, statutory appointees wish to remove "extra" copies of papers documenting their major activities while in office. When such a compilation is assembled, special care is taken that no "record" material is included. The "nonrecord" material used for this purpose includes, as defined by the Records Disposal Act of 1943 and its successor, the Federal Records Act of 1950, extra copies of documents preserved only for convenience, such as (1) "reading files" copies of correspondence, (2) "tickler," "follow-up," or "suspense" copies of correspondence, (3) identical duplicate copies of all documents maintained in the same file, and (4) extra copies of printed or processed materials of which official copies have been retained for purposes of record. (Enclosure 1 gives the Navy's definition of nonrecord material.)

The removal of such a compilation by a departing appointee is complicated, particularly in the Department of Defense, by the classification of a substantial number of the documents, even after review for declassification. Continued protection has to be provided for all classified material as well as for information of a privileged or "For Official Use Only" nature that is not generally available to private citizens. (Note Enclosure 2, "Information to Guide Presidential Appointees on the Removal of Documentary Materials and Papers.)

The solutions of these problems include primarily donation of these papers to a Presidential library or leaving

the collection in the custody of the appointee's department. In either case, the collection remains under the security control of the U.S. Government, exercised by the National Archives and the department concerned.

Future access to such material by the former appointee is facilitated by Section 12 of Executive Order 11652:

> "The requirement in Section 6(a) that access to classified information or material be granted only as is necessary for the performance of one's duties shall not apply to persons outside the executive branch . . . who have previously occupied policy-making positions to which they were appointed by the President. . . . "

Military officials in top positions have been familiar with the statutory provisions relating to official records throughout their career. Special efforts are made by the military services to have them deposit their papers with the historical office of their service. (See Enclosure 3 for sample solicitations.)

In summary, existing procedures for the handling of papers of top officials have worked satisfactorily in the great majority of cases. The problems that have been encountered from time to time include:

1. The absence of clear guidelines from higher authority on the removal of papers by retiring officials. (Such guidelines affecting only department and agency heads of the Eisenhower Administration were issued in 1959 as a Cabinet Paper.)

2. The inclusion in personal papers of not only strictly private material but also of "extra" copies documenting major activities, raising the possibility of accidental release of classified or privileged information.

3. While retiring officials are now solicited to deposit their papers with a Presidential library or the historical office of their department and most follow this course, more might take advantage of this procedure if their future access to the classified items in such papers were extended beyond the Presidential-appointee category.

Enclosure 1

Nonrecord Material

(Definition from SECNAVINST P5212.5B, Part I, Appendix G, Glossary of Terms)

20. Materials that have no documentary or evidential value and that need not be filed. These are accumulated in the process of producing records, but they never acquire a "record" character:

a. stocks of publications and other reproduced documents maintained for supply purposes;

b. materials preserved solely for purposes of reference or exhibition in libraries or museums;

c. duplicate copies of material maintained within the same organization when serving the same functional purpose;

d. copies of reproduced or processed materials when other copies are retained elsewhere for official record purposes;

e. extra copies of papers preserved solely for convenience of reference, e.g., reading files, and "follow-up" or "tickler" or "suspense" copies of materials that may be destroyed after a brief period; abstracts or briefs of material maintained for tickler purposes;

f. privately purchased books and other papers relating to private personal matters and kept in an office only for convenience;

g. correspondence and other records of transitory value that have neither evidential nor informational value after action has been completed or that are received for information and require no action. Some examples of this nonrecord category are:

1. published materials received from other activities or offices requiring no action and not required for documen-

tary purposes, provided official record copies are retained by the originating office or activity;

2. letters or other transmitting papers that add no significant information to the material submitted;

3. catalogs, trade journals, and other documents or papers received from other Government agencies, commercial firms, or private institutions, that require no action and are not a part of a case upon which action is taken;

4. working papers, preliminary or intermediate drafts, reports and related papers, memoranda, preliminary worksheets or notes and similar materials that are summarized in final or other form and that have no evidential or informational value once action has been completed since they do not relate to significant steps taken in preparing record copies of documents;

5. reproduction materials such as stencils, hectograph masters, and offset plates;

6. shorthand notes, stenographic notebooks, and stenotype tapes that have been transcribed;

7. information copies of correspondence and memoranda and other papers that require no administrative action; ministrative action;

8. notices or other papers that are not the basis for official action;

9. charts, diagrams, and other graphic materials, prepared from source material and used for briefings or training activities;

10. statistical tabulating aids used incidentally in the documenting process;

11. routine records used to control or facilitate actions;

12. personal work papers, such as notes, rough drafts, cards, etc.

13. library material: publications and other materials maintained by libraries *exclusively for reference purposes.*

(Some activities transfer their "record" copies of publications or research reports to their libraries where they are retained for the activities and may also be used for reference purposes. The fact that these are maintained in libraries rather than in the official files does not change the record character of publications so transferred; these still remain "record" material.)

Enclosure 2

INFORMATION TO GUIDE PRESIDENTIAL APPOINTEES ON THE REMOVAL OF DOCUMENTARY MATERIALS AND PAPERS

1. When a Presidential Appointee leaves office, the question arises whether he may take any papers or documentary materials with him as he returns to private life. Information herein is provided as a guide for these officials under such circumstances.

2. While in some instances, to be discussed hereafter, there is room for latitude in making specific determinations in regard to papers or other materials that legitimately may be removed by an outgoing Presidential Appointee, discretion must be exercised. The removal of materials, moreover, must be documented in a record sent to the SECNAV official file room for permanent retention. Some points to be considered before removing records or other materials are:

a. *Definition of Official Records.* Official "records," as defined in 44 USC 3301, are any documentary materials, regardless of physical form or characteristics, made or received by any agency or department in pursuance of Federal law or in connection with the transaction of public business, and which are evidence of, or give continuity to, the organization, functions, decisions, policies, operations, procedures, and other activities of the department, or contain data of informational value. Some evidence or information concerning these matters is contained in practically all documents received or created. Hence, these documents should not be removed, particularly if their removal will create a "gap" in the documentation of the department's business transactions or its history.

b. *Statutory Prohibitions Against Removal.* There are statutory prohibitions against the removal of (1) official records, as defined above, (2) records or information

security classified under provisions of Executive Order 11652, and (3) specific categories of Government records, such as cryptographic materials, income tax returns, social security records, patent records (covered by special statutes). Removal or unlawful destruction of any of these is prohibited and is punishable as a criminal offense under 18 USC 2071, which reads pertinently:

"Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, wilfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States."

c. *Extra Copies.* Carbons or other reproduced copies, as well as original documents, are records. Whether "extra" copies, which may have been maintained for convenience of reference, are removable depends largely upon whether there is policy or legal reasons that the information they contain should be of a privileged or "For Official Use Only" (FOUO) nature, and therefore not generally available to the public or a private citizen. If the material is privileged or FOUO, it belongs to the Government and not to the official involved. Officials should be discreet, therefore, in removing "extra" copies, if they may contain information not generally available to a private citizen. Again, the removal of such material should be documented.

d. *Privileged Papers.* Privileged papers, such as copies of Cabinet and National Security Council papers, should not be removed. If an outgoing official has reason to retain such documents, he must obtain prior approval of the Secretary of the National Security Council, as appropriate, and also of the incumbent head of his agency (i.e., Secretary of Defense or Secretary of the Navy), who officially is charged with possession of the papers.

e. *Classified Documents.* As already noted, removal of classfified documents is prohibited. However, if the outgoing official wishes to remove copies of classified documents, he may request that the material or information be reviewed for possible declassification under established procedures, in compliance with Federal regulations and Executive Order. Once declassified, normal rules with respect to removal apply.

f. *Gossipy Material.* Material that by its very nature is gossipy or frivolous, or might cause embarrassment if disclosed, should be purged from the files.

g. *Personal Papers and Diaries.* Papers that are purely personal, of course, may be removed. These include papers, such as correspondence and notes, received and originated or signed by the official essentially as a private citizen, in contrast to those he receives or signs as an agency official. Also included in this category are personal diaries, provided the diary is not in fact a collection of Government documents and information.

h. *Office Diaries.* Office diaries, logs, and the official's own memoranda of conferences "usually" are removable, provided the materials are not privileged or "For Official Use Only," and their removal does not leave a gap in the agency's history.

i. *Personal-Official Papers.* As stated, strictly personal papers may be removed; but some papers are a mixture of official and personal business. Hence, judgment should be used in removing "mixed" papers, to insure that the official record is not removed. Again, the removal of any material withdrawn should be documented.

3. Personnel of the Naval Records Management Division (Op-09B1) are available to assist the staffs of the Secretary and his Civilian Executive Assistants in resolving questions or problems in this area which may arise.

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

OFFICE OF THE GENERAL COUNSEL

08 Sep 1976

Mr. Herbert Brownell, Chairman
National Study Commission on Records
and Documents of Federal Officials
Department of Justice
Room 1127
Washington, D.C. 20530

Dear Mr. Brownell:

This is in response to your letter of June 18, 1976, regarding the control and disposition of Federal Trade Commission documents. The following are the answers to the numbered questions contained in your letter:

1. It has been customary for Commissioners and other agency employees to remove papers they consider personal from their files at the time that they leave the agency. They have also been permitted to retain copies of documents constituting their work product, leaving the original in the agency's files.

   A. Because employees are permitted to remove only personal papers and copies of other documents, the Commission does retain a complete record of its official business.

   B. The Commission expects former employees to observe ethical obligations not to disclose nonpublic agency documents outside the agency. On only one occasion has the Commission initiated disciplinary proceedings against a former employee for the alleged improper disclosure of an agency document. See *Charlton v. FTC,* Civil Action No. 1926-73 (D.C. Cir. 1976).

C. The regulations adopted by the Commission pursuant to the Privacy Act of 1974 protect the privacy of personal information concerning agency employees by limiting the distribution of files containing personal information within the agency. It is expected that former employees will not violate their ethical obligations by removing such files when they leave the Commission.

D. Former officials may obtain access to Commission files only by submitting a request for access pursuant to the Freedom of Information Act and the Commission's regulations thereunder.

E. Historians and other members of the public may obtain access to Commission files only by submitting a request under the Freedom of Information Act and the Commission's regulations thereunder.

2. The Commission has never issued formal regulations or operating procedures specifically concerning the removal of documents by departing employees. It is expected, however, that they will meet the general standards set forth in the regulations for current employees. 16 C.F.R. §§ 0.735-14, 15. The procedures governing requests for access to Federal Trade Commission files under the Freedom of Information Act are found at 16 C.F.R. § 4.11. Requests for access to personal information in the Commission's files under the Privacy Act of 1974 are found at 16 C.F.R. §4.13(c). Copies of these regulations are enclosed for your information. On March 13, 1974, the Commission also made a public announcement of a new "openness" policy designed to increase the amount of information available to the public. A copy of the press release which announced the openness policy is enclosed. Finally, the Commission has determined to

make available to the public motions to quash compulsory process issued by the Commission and requests by former employees for clearance to participate in agency proceedings, and the responses to such motions and requests.

3. The same limitations on access to Federal Trade Commission files apply to former officials and members of the public generally. Records which do not qualify under one of the Freedom of Information Act's exemptions from mandatory disclosure are released upon request. Requests for exempt materials are initially denied, but will be considered by the Commission upon receipt of an appeal from that initial denial. Such appeals, including the possible exercise by the Commission of its discretion to release records notwithstanding their exempt status, are decided by the Commission on a case-by-case basis.

Present employees are permitted access to any Commission records containing information which would aid in the performance of their official duties. The major exception to this rule is the restriction placed on access to information collected in connection with certain of the Commission's statistical reporting programs, such as the Line-of-Business Reports. Such information collected from various corporations is subject to very strict control so that it cannot be used by Federal Trade Commission personnel other than those preparing the reports. An example of the types of regulations which govern the handling of such information are the Line of Business Regulations published at 41 Fed. Reg. 28041 (1976). A copy of those regulations is enclosed.

4. Implementation of the Freedom of Information Act has required the creation of a separate branch within

the Office of the Secretary to process access requests at the initial level. In calendar year 1975, this branch processed five hundred and twenty nine (529) initial requests. The Office of the General Counsel devoted approximately 25% of its time to the processing of one hundred and sixty one (161) administrative appeals and thirteen (13) Information Act lawsuits filed during that year. The cost of administering the Freedom of Information Act in 1975 was approximately $420,000, an increase of approximately $280,000 over the 1974 cost.

With respect to the Privacy Act, this agency has had a total of three hundred and ninety seven (397) requests for access to records within the Commission's systems for the period September 27, 1975, to July 31, 1976. The overwhelming majority of these requests were made by Commission employees seeking access to their personnel files. The Commission has been able to satisfy the requirements of the Act with its existing structure; it has added Privacy Act responsibilities to those components already responsible for Freedom of Information Act matters. The Commission is currently preparing a report on Privacy Act implementation costs, pursuant to OMB Bulletin No. TQ-1. These data will be available by August 31, 1976.

5. The most serious records problem facing the Federal Trade Commission is simply handling the ever-increasing volume and complexity of access requests under the Freedom of Information Act. It is expected that requests pursuant of the Privacy Act of 1974 will also increase, although the impact on this agency's operations will not be as dramatic.

I hope that this information will aid your efforts. Please let me know if I can provide any additional information which might be useful to your Commission.

Sincerely,

/s/ Barry J. Cutler
Barry J. Cutler
Assistant General Counsel

Enclosures

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D.C. 20415

IN REPLY PLEASE REFERTO
ADM 5-7-2

Jul 27 1976

Honorable Herbert Brownell
Chairman, National Study Commission on Records
and Documents of Federal Officials
Justice Department
Room 1127
Washington, D.C. 20530

Dear Mr. Brownell:

This letter is in reply to your request of June 18, 1976, for assistance in your investigation of the problems of control, preservation and disposition of documents of federal officials.

Items 1 and 2

The Commission permits removal of personal papers by senior officials upon their retirement. We use the guidelines provided by the National Archives and Records Service (NARS) in November, 1972, to distinguish between personal papers and official records. The NARS guidelines define personal papers as follows:

> Personal papers of a Government official are the files he had organized and maintained for his own personal use, but they must be distinguished from official records. Federal law defines official records as those preserved by an agency, or appropriate for preservation by an agency, as "evidence of the organization, function, policies, decisions, procedures, operations, or other activities of Government or because of the informational value of data in them" (44 USC 3300). The law requires that certain procedures be followed for the preservation or disposal of official records; they may be disposed of only

with the approval of the Administrator of General Services.

Subject to these criteria, personal papers may include all or some of the following:

1. Personal correspondence of the official which does not directly concern the work of his office and which is not intended to be a part of the official records of the office.
2. Working drafts and notes, used and unused; notebooks.
3. Appointment calendars; logs of telephone calls.
4. Speeches, extra copies; draft of speeches; related correspondence.
5. Journals, diaries, scrapbooks, and press clippings.
6. Press releases issued by the office, extra copies.
7. Directories or lists of persons and positions in the office.
8. Personal photographs, motion pictures, and sound recordings.

A Government official customarily accumulates extra copies of Government documents for convenience of reference. Many of these documents are papers that he has drafted, reviewed, or otherwise taken action on. They are evidence of his contribution to the agency and its programs. The official may retain such papers, provided that they are eligible for disposition under Federal law as extra copies (44 USC 3301), and also provided that the agency records officer raises no objection to their designation as such.

The Commission's records management staff provides, upon request, assistance in distinguishing personal from official papers. The NARS guidelines have not yet been incorporated into our internal regulations.

Item 3

Agency regulations on access to Commission records are based on the requirements of the Freedom of Information and Privacy Acts. These regulations cover equally former senior officials, present and former employees of all levels, and private citizens and private sector organizations. Regulations concerning the Freedom of Information Act are contained in Part 294 (enclosure 1) of the Federal Personnel Manual Supplement 990-1. Parts 293 (enclosure 2) and 297 (enclosure 3) contain our regulations involving the Privacy Act.

Included in this package is a copy of our Index to Civil Service Commission Information (enclosure 4). The Commission's library is responsible for the Index. In addition to the Index, the library provides certain other information services. These services are as detailed in our Administrative Manual Chapter 179 (enclosure 5).

Item 4

During Calendar Year 1975, the Commission processed 500 Privacy Act requests. We have no statistics on the number of Freedom of Information Act requests processed in Calendar Year 1975. The overall cost (direct labor, indirect labor and other costs) for administering the Privacy Act for twelve months of this Fiscal Year ending June 30, 1976, was approximately $552,000. The overall cost for the Freedom of Information Act was approximately $331,000. For your further information, we have attached our Calendar Year 1975 reports on the Privacy Act (enclosure 6) and the Freedom of Information Act (enclosure 7).

Sincerely yours,

James C. Spry, Executive Assistant to the Commissioners

Enclosure 7

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

Mr. Herbert Brownell, Chairman
National Study Commission on Records
and Documents of Federal Officials
Department of Justice, Room 1127
Washington, D.C. 20530

Dear Mr. Brownell:

This is in response to your letter of June 18, 1976, which requested information concerning policies and practices of the Department of the Interior with respect to the disposition of papers in the custody of senior officials when they leave office; limitations on access to agency records by former officials, present employees, and private citizens; experience in implementation of the Freedom of Information and Privacy Acts; and any specific problems encountered with respect to the disposition of official records and documents.

The requested information is enclosed in the desired form of descriptive statements, with accompanying pertinent exhibits. We are pleased to be of assistance in your study.

Sincerely yours,

/s/ Richard R. Hite
Deputy Assistant Secretary —
Management

Attachments

INFORMATION FOR THE NATIONAL STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS

1. *Disposition of Papers in the Custody of Senior Officials.* The practices of the Department of the Interior with respect to the treatment and disposition of papers in the custody of senior officials at the time they retire (or otherwise depart) from office are in accordance with the policy of the Department as expressed in Part 436, Chapter 1, of the Departmental Manual (Removal of Papers on Leaving Department — Removal of Official Records). This Chapter, in pertinent part, provides as follows:

> .1 *General.* Documentary materials which fall under the statutory definition of "records" may be disposed of only in accordance with the statute and applicable records control schedules. Records made in connection with the transaction of public business or pursuant to law belong to the Government, not to any individual officer or employee.
>
> .2 *Standards.* To implement the legal restrictions against the removal of records by any employee leaving the service of a Federal agency, the following standards will apply:
>
> A. Papers which are clearly personal may be removed. These include such items as office diaries, logs, workaids, etc. Such papers are to be plainly labelled "Personal" and filed separately from official records of the Department. In the case of papers containing both personal and official matter, extracts are to be prepared of the official portions for incorporation into the Department's records.
>
> B. Nonrecord materials may be removed, provided their withdrawal does not create such a gap in official files as to impede the proper documentation of Departmental activities.
>
> C. Extra copies of unclassified records may be removed provided:
>
> (1) There are no legal or policy objections to their removal.
>
> (2) They were produced by an outside agency which is agreeable to their removal.
>
> (3) Affirmative action is taken to insure that the record copy and sufficient nonrecord copies required for the efficient transaction of business are available in official files of the Department.

In our view, this Chapter provides a legally sound framework for the handling of records of departing employees. The Chapter appears consistent with the Cabinet Paper of July 27, 1959, which provided specific guidance for the handling of papers of senior officials. We feel that the Chapter is also consistent with the Federal Records Act, 44 U.S.C. 3301-3314. In our view, even the workpapers of Government officials are records subject to the Act. *See, Nixon v. Sampson,* 389 F.Supp. 107, 145 (D.D.C. 1975). Workpapers, notes, logs, workaids, and extra copies of official documents are ordinarily not subject to records disposal procedures, however, and may be disposed of at the discretion of each employee (41 CFR 101-11.401-4.) In view of this discretion to destroy such documents, it seems to us permissible for an employee to remove documents when he retires, subject to a review to assure that their removal will not create gaps in the official records of the Department.

The cited practice and policy explicitly provides for the retention of a complete record of agency business, along

with the Department's policies and practices in records maintenance and disposition. The need to protect the confidentiality of sensitive information is recognized and fully provided for in the Department's policy and procedure as stated in Part 442, Chapter 1, of the Departmental Manual (Security — Classification, Declassification and Safeguarding of National Security Information and Material). This security policy does not provide for the physical retention of classified national security information by any individual upon retirement or other termination from the Department. Upon departure, every official whose position required access to classified national security information is required to sign a Security Termination Statement, in the presence of a witness, certifying to awareness of a continuing responsibility for safeguarding the knowledge of classified information gained during the course of employment. An oral security debriefing is given in all cases when the terminating employee has had a special access authorization or had access to TOP SECRET information.

The Department's policy with respect to Government employees is to protect their personal privacy. The following policy is stated in Part 370, Chapter 293, of the Departmental Manual (Personnel — Personnel Records and Filed)

> "Personal information may be collected and/or maintained only if the information is relevant and necessary to perform officially required personnel management functions and is collected with the full knowledge of the employee."

The Department recognizes the need of former officials to have access to appropriate records after leaving office, subject to limitations described below. In general, "need-to-know" considerations govern the occasional instance when this happens. For example, former Under Secretary Whitaker has been afforded access to records since he left the Department. Also, the Southwestern Power Administration has honored a request that their former Administrator receive copies of a number of papers and records for deposit in the Harry S. Truman Library.

The public, and historians as a specialized part of the public, have rights to access appropriate agency records, especially under the Freedom of Information Act (see 4 below), but not confined to that Act. The Department's policy concerning treatment of requests for records from the public is expressed in 43 CFR 2.13 (Public Lands: Interior — Records and Testimony: (Subpart B: Inspection of Records) Records Available). Pertinent portions of this section provide:

> (a) *Department policy.* It is the policy of the Department of the Interior to make the records of the Department available to the public to the greatest extent possible, in keeping with the spirit of the Freedom of Information Act.
>
> * * *
>
> (d) *Decisions on requests.* It is the policy of the Department to withhold information falling within an exemption [from mandatory disclosure under the Act] only if (1) disclosure is prohibited by statute or Executive Order or (2) sound grounds exist for invocation of the exemption.

Finally, historical records of the Department are routinely transferred on a continuing basis to the National Archives, where they are appropriately accessible to the public and historians.

2. *Summary of Agency Regulations.* The Department's regulations concerning the practices and policies in 1 above are summarized or excerpted in the context of the substantive discussion above. The following is a listing of those cited. Copies are attached at the tab indicated for each.

Tab A. *436 DM 1.* Removal of Papers on Leaving Department — Removal of Official Records

Tab B. *442 DM 1.* Security — Classification, Declassification and Safeguarding of National Security Information and Material

Tab C. *370 DM 293.* Personnel — Personnel Records and Files

Tab D. *43 CFR 2.13.* Public Lands: Interior — Records and Testimony: (Subchapter B; Inspection of Records) Records Available

3. *Limitations on Access to Agency Records.* The Department prescribes no special limitations on access to agency records by former senior officials, present and former employees, and private citizens and organizations. Any limitations to such access are based on those cited in 1 above, and the Privacy and Freedom of Information Acts (see 4 below).

4. *Experience in Implementation of Freedom of Information and Privacy Acts.* We are unable to supply a specific figure on the volume of requests which the Department is now receiving under the Freedom of Information Act. Initial requests are handled on a decentralized basis by the 13 bureaus and more than 20 offices of the Department. In 1972, a survey of the Department was undertaken. This survey reported that between July 4, 1967, and July 4, 1971, the Department received 62,000 requests for records, exclusive of requests made to the Bureau of Land Management for copies of land records. During the period, the Bureau of Land Management received some 638,000 requests for land records. The 1974 Amendments to the Freedom of Information Act (which took effect in February 1975) have clearly produced an increase in requests for records which specifically rely on the Act. Evidence of this increase is found in the fact that the number of initial

denials of requests made under the Act rose from 26 in 1974 to 120 in 1975. The number of appeals from initial denials also grew, perhaps even more dramatically. In 1974, three appeals were decided; in 1975, 27 appeals were handled. Preliminary figures for 1976 suggest a continued upward trend in denials and appeals. During the first 7 months of calendar 1976, some 30 appeals were filed. We are doubtful, however, that the increase in the number of denials and appeals means that the total number of requests for records has risen spectacularly over the levels of 1967-1971. Most of the requests for records received during the 1967-1971 period did not specifically cite the Freedom of Information Act (although they may have technically been subject to treatment under the Act). We suspect that the volume of requests of this type has not been significantly affected by the 1974 Amendments and that such requests have experienced no more than a moderate growth in volume since 1971.

No signficiant organizational adjustments have been made by the Department to cope with the Freedom of Information Act. While the absence of a centralized mechanism for treating requests has potential disadvantages, a decentralized approach is the only feasible method for handling Freedom of Information Act requests in an agency as large and as far-flung as the Department of the Interior. This has been particularly true since the imposition, by the 1974 Amendments, of the 10-day time limit for processing initial requests under the Act. As to the cost of implementing the Freedom of Information Act, we are unaware of any records which would reflect the resources which the Department has had to commit to the Act.

As to the overall effect of the Freedom of Information Act on the Department of the Interior, we are of the view that the Act has not caused the major problems for the Department that it has for some agencies, such as the FBI. So far

as we are aware, the Act has not generally resulted in major diversions of resources to the processing of requests for records. The potential for such diversions does exist, however, as is shown by the experience of two small offices, the Office of Equal Opportunity and the Alaska Pipeline Office. Both offices have had to devote significant staff time to processing of Freedom of Information Act requests. In the case of the APO, this diversion of time from other duties has been caused by a small number of exceedingly persistent requestors.

A copy of the Department's 1975 annual report to the Congress on implementation of the Freedom of Information Act is attached at Tab E. The report provides additional background information on administration of the Act.

Implementation of the Privacy Act has not required any significant organizational adjustments, other than the designation of Department and Bureau Privacy Act Officers. However, the administrative burden of implementing the Act has been substantial. As reported to the Office of Management and Budget, the Department's start-up costs for implementation are estimated at about $600,000 for the period between January 1975 and September 1976. Operating costs for the year ending in September 1976 are estimated at nearly $200,000. These costs include such activities as publishing requirements, training, granting access, correcting records, security and control, accounting for disclosures, and new data collection procedures. The Department does not have current information on requests for access, but we do know that they have been relatively few, and that there has been only one appeal. The Department's regulations covering the Privacy Act (43 CFR 2, Subpart D) and its internal policy and procedure issuance (Part 317 of the Departmental Manual: Privacy Act Requirements) are attached at Tab F.

5. *Specific Problems Encountered.* The Department's problems with respect to the control, disposition, preservation, or definition of official records and documents primarily relate to the Freedom of Information and Privacy Acts. A description of some of these problems follows, as presented by the Bureau or office experiencing them.

a. *Office of Organization and Personnel Management.* One problem we have been experiencing of late is recurring requests from the same requesters on the same subject — almost as "badgering" technique. While we may send them our regulations on appeal procedures (if they do not like their answer), this does not prohibit additional inquiries. We of course can send basically the same response on each instance, but it does take up our time. We are unaware of any provisions for us to not answer requests under the Freedom of Information Act regardless of the reason (and would not want to for legitimate requests) but some provisions should be made for those who see the Federal Government as a "pen pal." In all probability we are not the only ones experiencing this problem.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption omitted in printing)

SECOND AFFIDAVIT OF HENRY A. KISSINGER

HENRY A. KISSINGER, being duly sworn, deposes and says:

1. I am one of the defendants in the above-captioned actions. This affidavit is given in support of my Cross-Motion for Summary Judgment filed herein, and states facts within my own knowledge.

2. From January 20, 1969, until September 22, 1973, I served in the White House as Assistant to the President for National Security Affairs. From September 22, 1973, until November 3, 1975, I served both as Assistant to the President for National Security Affairs and as Secretary of State. After November 3, 1973, I continued to serve as Secretary of State until January 20, 1977.

3. During the period of my government service, my secretaries generally monitored my telephone conversations and took shorthand notes of what was said. These notes were later transcribed and filed in my personal files; the shorthand notes were not kept. My purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow up on matters discussed orally. There was nothing unusual about this; many other high-level officials at the White House, the State Department, and other departments of the government have for decades followed the same practice of transcribing telephone conversations and filing them with their private papers.

4. In my case, the notes served as work aids to ease the administrative burdens of my office. For example, my executive secretary checked them periodically in order to prepare my appointments schedule and keep it current. The notes were also read by my Senior Special Assistant so that he could keep abreast of my activities. This saved time, as it enabled him to know whether any matters I had discussed required follow-up or implementation without waiting for me to report the substance of my telephone conversations. The notes had no other function, and were used for no other purposes.

5. The monitoring of my conversations was not limited to discussions of official business, but included most of my conversations without regard to their subject matter or the identity of the other party to the conversation. It was not practical to limit the monitoring to official conversations, because I would not always know the character of a conversation until after it had begun. Thus, the transcribed notes give details of my conversations with friends, journalists, diplomats, government officials, two Presidents, scholars, Congressmen, and other people. Many of these conversations were of a purely personal character; this is true of conversations with diplomats, Congressmen and other government officials as well as conversations with others. Other conversations were of a mixed character, in which discussions of personal and official matters were intermingled. Even formal business conversations would concontain humorous and other personal and non-official remarks.

6. I always regarded the telephone transcripts as work aids which I could retain or discard as I chose as had several of my predecessors and many other officials. They were not filed among the official records of any agency, but were stored along with the rest of my personal papers in personal files located in my office. The notes were not to my

knowledge circulated outside my office, and only I and my immediate personal staff had access to them. I did not edit the notes as they were made, or at any other time. There was no need to do so, because no one other than my immediate staff used them and they could obtain the limited information they needed from the rough notes themselves. Had I believed the telephone transcripts would be treated as official records, I would have been obliged to edit them as they were made in order to assure that the stenographers had understood correctly and that the notes were accurate and complete and in suitable form for filing as official records. Since this would have required a substantial commitment of my time, I probably would have decided the notes were not worth the effort, and thus would not have made them at all.

7. As the end of my term as Secretary of State drew near, I began to make plans for leaving public office. I believed that the papers relating to my years in government should be preserved, and decided to donate them to the United States. I chose the Library of Congress as the custodian of these papers, because I knew it had been used as a depository by many other Secretaries of State.

8. In making this donation, I wanted to include not only my personal papers, but also copies of official State Department records relating to my activities. I believed that such a collection of personal and official papers would provide a unique opportunity for future historians by assembling in one place all the papers relating to my years of association with government.

9. To accomplish this objective, it was necessary to obtain State Department approval to transfer my working files, which contained copies of official documents connected with my activities, to the Library. This approval was required because the State Department's policies do not permit a retiring official to retain copies of classified

documents unless it is satisfied that the documents will be stored in facilities suitable for the receipt of such materials. To satisfy this requirement, it was necessary to secure approval by the Department's Office of Security for the proposed storage facilities at the Library and to establish procedures for review of the working files to assure that they did not contain any original records which should have been filed in the Department's Central Files. The steps taken in meeting these requirements are described in a Donation Procedures Memorandum, dated November 12, 1976, a copy of which is attached hereto.

10. The procedures adopted in connection with transfer of my working files to the Library of Congress did not apply to my personal files, because Department of State regulations presume that papers which were designated and filed as personal from the date of origin or receipt may be removed by a retiring official without further processing. The telephone notes at issue here met this description, because they had originally been part of my personal files transferred from the White House to the State Department and had continued to be maintained in separate personal files during my years at the Department.

11. In addition, I had been advised by the Department's Legal Adviser, Monroe Leigh, that the telephone notes were not records of the State Department, but rather were my personal papers which I would be free to retain when I left office. He first gave me this advice in early 1976, and repeated it in a number of subsequent discussions. Mr. Leigh summarized the substance of that advice in a written memorandum, dated November 11, 1976, a copy of which is attached as Exhibit B to the complaint filed in No. 77-0220 herein.

12. In October 1976, I decided to remove the telephone notes from my office in the State Department. Since I had no suitable place of my own in which to store the notes, I

received permission from then Vice President Rockefeller to place them in a large bank-type vault at his estate in Pocantico Hills, New York. The removal and transfer occurred on October 29, 1976; it was arranged for me by Lawrence M. Eagleburger, at my request.

13. At about the same time, I asked Mr. Eagleburger to review the notes to determine whether extracts should be made of any portion of the notes for inclusion among the Department's official records. I chose Mr. Eagleburger because he had worked with me during most of the time I had been in government, was familiar with my activities, and therefore could identify the portions of the notes appropriate for extracting. My instructions to Mr. Eagleburger were that he should read all the telephone notes, including those from the White House period, and extract everything he believed was necessary in order to comply with the regulations and Mr. Leigh's advice. He subsequently reported to me that the extracts had been made and delivered to the Director of the Department of State Records Center and to the Staff Secretary of the National Security Council.

14. The agreement donating my State Department working files and personal papers from my years at Harvard University to the Library of Congress was executed on or about November 12, 1976. A copy of that agreement is attached as Exhibit A to the complaint filed in No. 77-0220 herein. In mid-December 1976, I decided that the telephone notes should also be part of the Library's collection. I executed a separate agreement relating to this donation on December 24, 1976. A copy of this agreement is attached as Exhibit C to the complaint filed in No. 77-0220 herein.

15. The notes were treated separately in a second agreement because I concluded that the access restrictions stated in the original agreement were not adequate to deal

with the special privacy problems presented by the notes. Many of the notes contained statements made in confidence which the speakers could reasonably assume would not be made public. Some of these statements might affect the reputations of prominent individuals still active in politics or foreign affairs. I believed there was a need to preserve the confidentiality of these conversations until sufficient time had passed to assure that they would be a part of history rather than of contemporary politics. Since it was necessary to protect not only my privacy, but the privacy of the persons with whom I spoke, I decided the second agreement should restrict access to these notes for the lives of *both* parties to the conversations.

16. At about the time the second agreement was signed, I asked Mr. Eagleburger to arrange for transfer of the notes from Pocantico Hills to the Library of Congress. I understand that this transfer was made on December 28, 1976.

17. Since this litigation began, I have had an opportunity to examine the notes. This limited inspection confirms my previous understanding that the notes are rough memoranda which vary considerably in quality according to the skill of the secretary who made them. Although some of the notes appear to be substantially verbatim, many others are only rough approximations of what was said. Quite a few of the notes I saw contained misspelled names, omissions, garbled passages, and outright errors of transcription. Although the notes are useful in refreshing my recollections of particular conversations in which I participated, I do not believe they could be regarded as accurate records of my conversations unless they were first corrected and placed in proper form for filing as records.

18. Future historians, who will have the opportunity of comparing the notes to official records after these records have been declassified, may find the notes useful. However,

I believe it would be highly inappropriate to release them now, when the full historical record of the period is still incomplete, and when many of the participants in the conversations are still active in public life.

/s/ Henry A. Kissinger
HENRY A. KISSINGER

[Jurat omitted in printing]

DEPARTMENT OF STATE

ACTION MEMORANDUM
S/S

November 12, 1976

LIMITED OFFICIAL USE

TO : The Secretary
FROM: M — Lawrence S. Eagleburger

Donation Procedures

Attached (Tab 1) is a proposed Deed of Gift and Agreement, which would be the legal instrument by which the collection of papers from your years in Government and from other periods of your life would be donated to the Library of Congress.

Paragraphs 2 and 3 of the proposed Deed of Gift and Agreement refer to Government review and approval of copies of Government papers that would be included in the collection. If you concur, papers will be reviewed in the Department of State in the following manner:

1. The Director of the Department of State Documents Center (FADRC) will designate up to three FADRC employees to review your Department of State files, which may include some personal papers which were not expressly designated or filed as personal from their time of origin or receipt. This is in accordance with Department regulations (5 FAM 417.1).

2. In reviewing these papers, the FADRC employees will crosscheck all Department documents in your files against the Central Foreign Policy File of the Department and those files retained in the Executive Secretariat, to ensure

that the central file is complete and that the Secretary's files do not include any original or record copies. If a Department record is found in your file that is not present in the central file, the FADRC employees will (a) make a duplicate of the paper, (b) place the duplicate in your files, and (c) take the necessary steps to include the document in the Department's record system. In some cases, certain documents may be temporarily retained in the Executive Secretariat rather than the Department's Central Foreign Policy File.

3. If the FADRC employees locate any paper which they consider to be personal or of a non-record nature, they will simply leave that paper in the file and take no action to include such items in the Department's central records. In the case of any document containing both personal and official matter, an extract of official contents will be prepared for inclusion in the Department's record system. In making determinations between personal, record, and non-record material, FADRC employees will be guided by the Director of FADRC, who will, as need arises, consult with one of your assistants and/or the Department's Legal Adviser in making a final decision. If you so desire, all documents or portions of documents duplicated for the central files can be so annotated on your copy.

4. After the Department's Document Center has completed its review of a file or group of files, it may be delivered to the Libarary of Congress under paragraph 3 of the Deed of Gift and Agreement at Tab 1.

5. Under the Department's regulations (5 FAM 417.1a), you are entitled to retain papers that have been expressly designated or filed as personal from their time of origin or receipt. In accordance with paragraph 3 of the Deed of Gift and Agreement, these personal papers may be transferred to the Library of Congress at any time within three months after the Deed of Gift and Agreement is signed.

6. The Department of State's Office of Security has completed an inspection of the storage facilities at the Library of Congress to be used for the storage of your collection of papers. It has been determined that they satisfy the requirements for storage of all classified or controlled information, provided the Library of Congress takes certain steps with respect to the storage area (see Tab 3). The Library of Congress has undertaken to complete these steps within the coming week. No copies of Government papers will be delivered to the Library until these steps are completed.

7. At the time you resign your position as Secretary of State and leave the Department, you will be required (under 5 FAM 417.2) to sign a Separation Statement, Form JF-3. A copy of the Statement you will be required to sign appears at Tab 2.

As noted below, the procedures discussed in this memorandum, as well as the provisions in the Deed of Gift and Agreement pertaining to the Department of State, have been approved by the Department officers concerned. If you concur, the procedures discussed in this memorandum will be implemented.

Recommendation:

That you concur in the procedures described in this memorandum.

Approve __ Disapprove_____

Attachments:

1. Proposed Deed of Gift and Agreement.

2. Copy of Separation Statement, Form JF-3.

3. Memorandum from the Office of Security concerning the storage area at the Library of Congress.

4. Excerpt of Department of State Regulations.

Clearances:

L—Monroe Leigh /s/ M.L.

A—John Thomas /s/ J.T.

A/O/FADRC—Jack Pruden /s/ J.P.

[Attachments 1 and 3 omitted in printing]

[Attachment 2]

STATE—AID—USIA
SEPARATION STATEMENT

I, Henry A. Kissinger, make the following statement in connection with my separation from employment in the Department of State, the United States Information Agency or the Agency for International Development. As used herein, the term "employment" includes all periods of assignment or detail, as well as any periods of temporary, part-time or intermittent employment therein, and the term "separation" includes suspension for any period in excess of 30 days, retirement from active duty, transfer to another agency, resignation, furlough to enter military service, etc. Subject to the Memorandum dated November 1976, entitled "Donation Procedures" —

1. I have surrendered to responsible officials all classified or administratively controlled documents and material with which I was charged or which I had in my possession, and I am not retaining in my possession, custody, or control, documents or material containing classified or administratively controlled information furnished to me during the course of such employment or developed as a consequence thereof, including any diaries, memorandums of conversations, or other documents of a personal nature that contain classified or administratively controlled information.

2. I have surrendered to responsible officials all unclassified documents and papers relating to the official business of the Government acquired by me while in the employ of the Department, USIA or AID.

3. I shall not publish, nor reveal to any person, any classified or administratively controlled information of which I have knowledge, or any other information transmitted to me in confidence in the course of my official duties, except as may be authorized by officials of the employing Department or Agency empowered to grant per-

mission for such disclosure.

4. I have been advised by the interviewing officer whose name appears below and understand the criminal penalties relating to U.S. Government records and information and the use thereof:

Title 18, U.S. Code

Section 641 — Public Money, Property or Records
793 — Gathering, Transmitting or Losing Defense Information
794 — Gathering or Delivering Defense Information to Aid Foreign Govt.
798 — Disclosure of Classified Information
952 — Diplomatic Codes and Correspondence
1905 — Disclosure of Confidential Information
2071 — Concealment, Removal, or Mutilation of Records

Title 50, U.S. Code

Section 783(b) — Communication of Classified Information by Government Officer or Employee
783(d) — Penalties for Violation

Title 42, U.S. Code

Section 2272 — Violation of Specific Sections
2273 — Violation of General Sections
2274 — Communication of Restricted Data
2275 — Receipt of Restricted Data
2276 — Tampering With Restricted Data
2277 — Disclosure of Restricted Data

5. I have been advised by the interviewing officer whose signature appears below and fully understand that Section 1001 of Title 18, United States Code, provides criminal penalties for knowingly and willfully falsifying or concealing a material fact in a statement or document submitted to any department or agency of the United States Government concerning a matter under its jurisdiction.

(Signature of Interviewing Officer)	*(Signature in Presence of Interviewing Officer)*
(Date)	*(Date)*
(Typed Name of Interviewing Officer)	*(Typed Name of Employee)*
(Post, Department or Agency)	*(Other Names Used During This Period of Employment)*

FORM JF-3 (Formerly DS-1055)
7-67

GPO: 1967 O - 305-210(23)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*, Plaintiffs,	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, *et al.*, Defendants.	)	

AFFIDAVIT OF MONROE LEIGH

DISTRICT OF COLUMBIA: SS

MONROE LEIGH, being duly sworn, deposes and says:

1. I am a partner in the law firm of Steptoe & Johnson. From January 21, 1975, to January 20, 1977, I was Legal Adviser of the Department of State. This affidavit is given in connection with the above-captioned action, and states facts within my own knowledge.

2. Exhibit B to the amended complaint filed herein is a memorandum, dated November 11, 1976, addressed by me, as Legal Adviser of the Department of State, to Dr. Kissinger, who then was Secretary of State. This memorandum summarizes oral advice previously given to Dr. Kissinger relating to the transcribed notes of his telephone conversations which are at issue in this litigation. My general conclusion, as set forth in the memorandum, was that the notes were not agency records of the Department of State, but rather were Dr. Kissinger's personal papers

which he would be free to retain when he left office.

3. The initial occasion for that advice was a Freedom of Information Act request, filed by William Safire in January 1976 and is attached to the amended complaint as Exhibit F. Mr. Safire's request demanded access to transcriptions of Dr. Kissinger's conversations in which Mr. Safire's name was mentioned, and to transcriptions of conversations between Dr. Kissinger and certain named individuals in which the subject of "leaks" was discussed.

4. It was my opinion that Mr. Safire's request should be denied because the notes were not "agency records" of the Department of State which would be subject to the Freedom of Information Act. In connection with my decision in this matter, I reviewed those transcribed notes which might have been considered within the scope of Mr. Safire's request. I also submitted the same notes to the Department of State's Council on Classification Policy, and was advised that they did not contain any classified materials. This decision of the Council on Classification Policy should not, however, be construed as a conclusion that *none* of the notes contained classified material, because the only notes submitted to the Council for review were those within the scope of Mr. Safire's request.

5. To the best of my recollection, I first orally advised Dr. Kissinger of my opinion that the notes of his telephone conversations were not agency records of the Department of State, but rather were his personal papers, at some time prior to the ruling on Mr. Safire's Freedom of Information Act request. I am certain that I repeated this advice on a number of subsequent occasions during the course of the next eleven months. I also suggested that he should, in view of the Department's regulations, and as a precaution, arrange for a review of the notes to determine whether they contain any significant policy decisions or actions not otherwise reflected in the Department's records and, if so, that extracts of these matters be made and submitted to the

appropriate agency records officer for filing. I do not recall precisely when this suggestion was made, but I believe that it was made before October 1976.

6. Near the end of Dr. Kissinger's term of office, I participated in the planning of his donation of personal and other papers to the Library of Congress. In connection with these plans, I reviewed and approved a Donation Procedures Memorandum, dated November 11, 1976. A copy of this memorandum is attached to the Affidavit of Henry A. Kissinger filed herein. This memorandum was also reviewed and approved by Lawrence M. Eagleburger, the Deputy Undersecretary for Management; by John Thomas, the Assistant Secretary for Administration; and by John Pruden, the Director of the Department of State Documents Center.

7. Paragraph 5 of the Donation Procedures Memorandum states that Dr. Kissinger would be entitled to retain papers that had been expressly designated or filed as personal from their date of origin or receipt, and that these personal papers could be transferred to the Library of Congress in accordance with his plans. Although this paragraph does not specifically mention the transcribed notes of Dr. Kissinger's telephone conversations, I and all of the other persons who signed the memorandum were aware of the fact that these notes were filed among Dr. Kissinger's personal files.

/s/ Monroe Leigh

Monroe Leigh

[Jurat omitted in printing]

Donation of Personal Papers to the Richard Nixon Library

The preservation of the papers and other historical materials of the President of the United States, together with the papers of his associates and contemporaries, is authorized by the Presidential Libraries Act of 1955. Under this act, Presidential libraries have been established for Presidents beginning with Herbert Hoover.

President Nixon has indicated his intention to deposit his papers in a future Richard Nixon Library. It will be administered, like the six operating Presidential libraries, by the General Services Administration through its National Archives and Records Service. Adding the personal papers of the men and women who helped President Nixon shape national policies will give perspective and accuracy to the study and understanding of his administration. To this end, the President has asked Cabinet officers, heads of Government agencies, and key officials under them to deposit their personal papers in the National Archives for the Richard Nixon Library.

In a Presidential library, the papers of an individual, like the papers of the President, are kept intact as separate, named collections. They are in the care of a professional staff of archivists who can give intelligent guidance to those who may wish to use them in the future and provide reference on them as needed by the donor. Donors may place restrictions and conditions on the use of the papers when they execute a deed of gift.

Personal papers of a Government official are the files he has organized and maintained for his own personal use, but they must be distinguished from official records. Federal law defines official records as those preserved by an agency, or appropriate for preservation by an agency, as "evidence of the organization, function, policies, decisions,

procedures, operations, or other activities of Government or because of the informational value of data in them" (44 USC 3300). The law requires that certain procedures be followed for the preservation or disposal of official records; they may be disposed of only with the approval of the Administrator of General Services.

Subject to these criteria, personal papers may include all or some of the following:

1. Personal correspondence of the official that does not directly concern the work of his office and that is not intended to be a part of the official records of the office. The correspondence may be with friends, family members, professional or business associates, or other administration officials. It may relate to purely personal interests or to national and State affairs, Government appointments, political campaigns, or other topics. Material on subjects in controversy or on personally sensitive matters may be protected by the terms of the deed of gift.

2 Working drafts and notes, used and unused; notebooks.

3. Appointment calendars; logs of telephone calls.

4. Speeches, extra copies; drafts of speeches; related correspondence.

5. Journals, diaries, scrapbooks, and press clippings.

6. Press releases issued by the office, extra copies.

7. Directories or lists of persons and positions in the office.

8. Personal photographs, motion pictures, and sound recordings.

A Government official customarily accumulates extra copies of Government documents for convenience of

reference. Many of these are papers that he has drafted, reviewed, or otherwise taken action on. They are evidence of his contribution to the agency and its programs. The official may retain such papers, provided that they are eligible for disposition under Federal law as extra copies (44 USC 3301), and also provided that the agency records officer raises no objection to their designation as such. Materials classified under Executive Order 11652 and those defined as "Restricted Data" under the Atomic Energy Act of 1954 must be handled in accordance with the provisions of the Executive order and of the 1954 act, respectively.

Physical objects belonging to the individual that have an association with the President or with the individual's Government service may also be part of an official's personal collection of historical materials.

In donating papers and other historical materials to a Presidential library, officials are reminded that the library contains papers covering the entire career of the President. It is therefore hoped that individuals will donate papers covering their entire careers. The more complete the material, the more dependable it is as historical evidence and the more useful to future historians, biographers, and other researchers.

The great value of personal papers is that when they can be released for scholarly research — a matter for the donor to decide — they provide background information on people, politics, and public issues not to be found in official Government records. For the biographer, they may also contain indispensable information on an individual's civic and business affairs and his family life. When studied in conjunction with official records, personal papers help document the special knowledge, abilities, interests, and characteristics of the men and women who comprise the highest level of Government. A Presidential library will hold all of this source material in trust, confident that both

the Nation and the individual will benefit from the fullest possible documentation of this era.

National Archives and Records Service
General Services Administration
Washington, DC 20408

November 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS Plaintiff	)	
vs	)	C.A. 77-220
VANCE AND KISSINGER Defendants	)	
MILITARY AUDIT PROJECT Plaintiff	)	
vs	)	C.A. 77-391
VANCE AND KISSINGER Defendants	)	

Washington, D.C.
September 28, 1977

The above entitled matter came on for hearing before THE HONORABLE JOHN LEWIS SMITH, JR., United States District Judge, at 11:00 a.m.

APPEARANCES:

ROBERT SUSSMAN, ESQ.
WILLIAM A. DOBROVIR, ESQ.
Attorneys for Plaintiffs

DAVID GINSBURG, ESQ.
Attorney for
Dr. Henry A. Kissinger

MS. BARBARA WARD
Attorney for Government-
Defendants

JOAN CURTIS BLAIR, CSR
OFFICIAL COURT REPORTER

[pp. 57-58]
Secretary of State, Henry A. Kissinger, when he was Secretary of State, with anyone — which the Department states, those records do, indeed, save for the records which have been transferred to the Library of Congress, the records do indeed repose in the files of the Department of State.

The objectio. made by the Department in this letter was that our request was over-broad. Our motion for summary judgment refers not only to the materials that are presently reposing in the Library of Congress, but also to materials that are reposing in the Department of State, and we have pointed out in our motion papers that the Department's claim cannot pass muster under the amendments of 1974 to the Act which simply refer to identifiable records — the request does reasonably descrfibe the records as stated in the Irons case in the District of Columbia Circuit, which we cited in our memorandum.

We pointed out that these records of the Secretary's conversations are obviously located in a single place. There is no claim to the contrary.

The Government —

THE COURT: Is there any distinction, in your opinion, between the notes made at the White House and those made in the Department of State?

MR. DOBROVIR: Yes. I am afraid I would have to agree that there is a distinction.

THE COURT: You would?

MR. DOBROVIR: And we have claimed only those files and records which are Department of State records. There is another wholly separate problem with respect to the records of Dr. Kissinger, as National Security Adviser. Those records, and I think that this is a matter of controversy which I am shocked that the Government has not yet raised — but those records are squarely covered by the Presidential Materials Act, which the Supreme Court has

upheld, and the Administrator of General Services is under a mandate, by that statute, to reduce to his posession, all materials covered by that statute.

Since, if these materials are in the Library of Congress, he is in a position to reduce them to his posession — regulations with respect to them have not been issued, and I trust that, in pursuance of his public trust and obligation under the statute, the Administrator will make efforts to obtain possession of these documents.

It may be that the secret proceedings which are

[ORIGINAL ENDS AS ABOVE]

[EXHIBIT A]

UNITED STATES GOVERNMENT MANUAL
1975/1976
REVISED MAY 1, 1975

NATIONAL SECURITY COUNCIL

Executive Office Building, Washington, D.C. 20506
Phone, 202-395-3000

MEMBERS

The President . . . . . Gerald R. Ford
The Vice President . . . . . Nelson A. Rockefeller
Secretary of State . . . . . Henry A. Kissinger
Secretary of Defense . . . . . James R. Schlesinger

OFFICIALS

Assistant to the President . . . . . Henry A. Kissinger
Staff Secretary . . . . . Jeanne W. Davis

The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1949 (63 Stat. 579; 50 U.S.C. 401 et seq.). Its function is to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security.

The Council is composed of the President, the Vice President, the Secretary of State, and the Secretary of Defense. The Council is located within the Executive Office of the President.

The Council considers policies on matters of common interest to the departments and agencies of the Government concerned with the national security and makes recommendations to the President.

For further information, contact the Staff Secretary, National Security Council, Executive Office Building, Washington, D.C. 20506. Phone, 202-395-3440.

Approved.

Jeanne W. Davis,
Staff Secretary.

UNITED STATES GOVERNMENT MANUAL
1973/74
Revised July 1973
(Revised Annually)

NATIONAL SECURITY COUNCIL

Executive Office Building, Washington D.C. 20506
Phone, 202-395-3000

MEMBERS

The President ..... Richard M. Nixon.
The Vice President ..... Spiro T. Agnew.
Secretary of State ..... William P. Rogers.
Secretary of Defense ..... James R. Schlesinger.

OFFICIALS

Assistant to the President
for National Security Affairs .... Dr. Henry A. Kissinger.
Staff Secretary ..... Jeanne W. Davis.

The National Security Council was established by the National Security Act of 1947 (61 St. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1949 (63 Stat. 579; 50 U.S.C. 401 et seq.). Its function is to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security.

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For further information, contact the Staff Secretary, National Security Council, Executive Office Building, Washington, D.C. 20506. Phone, 202-395-3440.

Approved.

Jeanne W. Davis,
Staff Secretary.

UNITED STATES GOVERNMENT
ORGANIZATION MANUAL
1972/73

Office of the Federal Register
National Archives and Records Service
General Services Administration

Revised July 1972
(Revised Annually)

NATIONAL SECURITY COUNCIL

Executive Office Building,
Washington, D.C. 20506.
Phone, 202-395-3000

MEMBERS

The President . . . . . Richard M. Nixon.
The Vice President . . . . . Spiro T. Agnew.
Secretary of State . . . . . William P. Rogers.
Secretary of Defense . . . . . Melvin R. Laird.
Director, Office of
Emergency Preparedness . . . . . George A. Lincoln.

OFFICIALS

Assistant to the President for National
Security Affairs . . . . . Dr. Henry A. Kissinger.
Staff Secretary . . . . . Jeanne W. Davis.

CREATION AND PURPOSE. — The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1949 (63 . . . .

UNITED STATES GOVERNMENT
ORGANIZATION MANUAL 1971/72

Revised July 1, 1971
(Revised Annually)

NATIONAL SECURITY COUNCIL

Executive Office Building,
Washington, D.C. 20506.
Phone, 202-395-3000

MEMBERS

The President . . . . . Richard M. Nixon
The Vice President . . . . . Spiro T. Agnew
Secretary of State . . . . . William P. Rogers.
Secretary of Defense . . . . . Melvin R. Laird.
Director, Office of Emergency
Preparedness . . . . . George A. Lincoln.

OFFICIALS

Assistant to the President for National
Security Affairs . . . . . Dr. Henry A. Kissinger.
Staff Secretary . . . . . Jeanne W. Davis.

CREATION AND PURPOSE. — The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1919 (63 Stat. 579; 50 U.S.C. 401 et seq.). Its function is to advise the President . . . .

UNITED STATES GOVERNMENT
ORGANIZATION MANUAL — 1970/71

Revised July 1, 1970 (Revised annually)

NATIONAL SECURITY COUNCIL

Executive Office Building,
Washington, D.C. 20506.
Phone, 395-3000

MEMBERS

The President ..... Richard M. Nixon
The Vice President ..... Spiro T. Agnew.
Secretary of State ..... William P. Rogers.
Secretary of Defense ..... Melvin R. Laird.
Director, Office of Emergency
Preparedness ..... George A. Lincoln.

OFFICIALS

Assistant to the President for National
Security Affairs ..... Dr. Henry A. Kissinger.
Staff Secretary ..... William Watts.

CREATION AND PURPOSE.— The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1949 (63 Stat. 579; 50 U.S.C. 401 et seq.). Its function is to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security.

ORGANIZATION. — The Council is composed of the President, the Vice President, the Secretary of State, the Secretary of Defense, and the Director of the Office of Emergency Preparedness.

The Council is located within the Executive Office of the President. Its staff is headed by a civilian executive

secretary, appointed by the President.

ACTIVITIES.— The Council considers policies on matters of common interest to the departments and agencies of the Government concerned with the national security and makes recommendations to the President.

For further information, contact the Staff Secretary, Executive Office Building, Washington, D.C. 20506. Phone, 395-3440.

Approved.

William Watts,
Staff Secretary.

UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1969 - 70

Revised July 1, 1969

NATIONAL SECURITY COUNCIL

Executive Office Building,
Washington, D.C. 20506.
Phone, 395-3000

MEMBERS

The President ..... Richard M. Nixon
The Vice President ..... Spiro T. Agnew.
Secretary of State ..... William P. Rogers.
Secretary of Defense ..... Melvin R. Laird.
Director, Office of Emergency
Preparedness ..... George A. Lincoln.

OFFICIALS

Assistant to the President for National
Security Affairs ..... Henry A. Kissinger.
Staff Secretary ..... Richard M. Moose.

CREATION AND PURPOSE.— The National Security Council was established by the National Security Act of 1947 (61 Stat. 496; 50 U.S.C. 402), amended by the National Security Act Amendments of 1949 (63 Stat. 579; 50 U.S.C. 401 et seq.). Its function is to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security.

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ACTIVITIES.— The Council considers policies on matters of common interest to the departments and agencies of the Government concerned with the national security and makes recommendations to the President.

For further information, contact the Staff Secretary, Executive Office Building, Washington, D.C. 20506. Phone, 395-3440.

Approved.

Richard M. Moose,
Staff Secretary.

ORGANIZATION

Assistant to the President for National Security Affairs
and
National Security Council Staff
1977

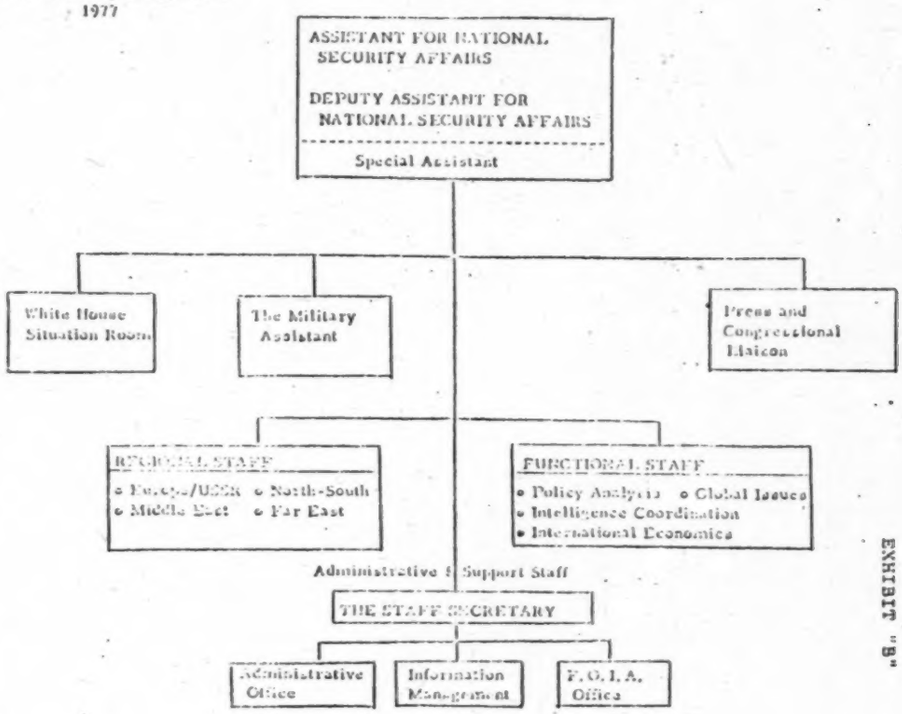

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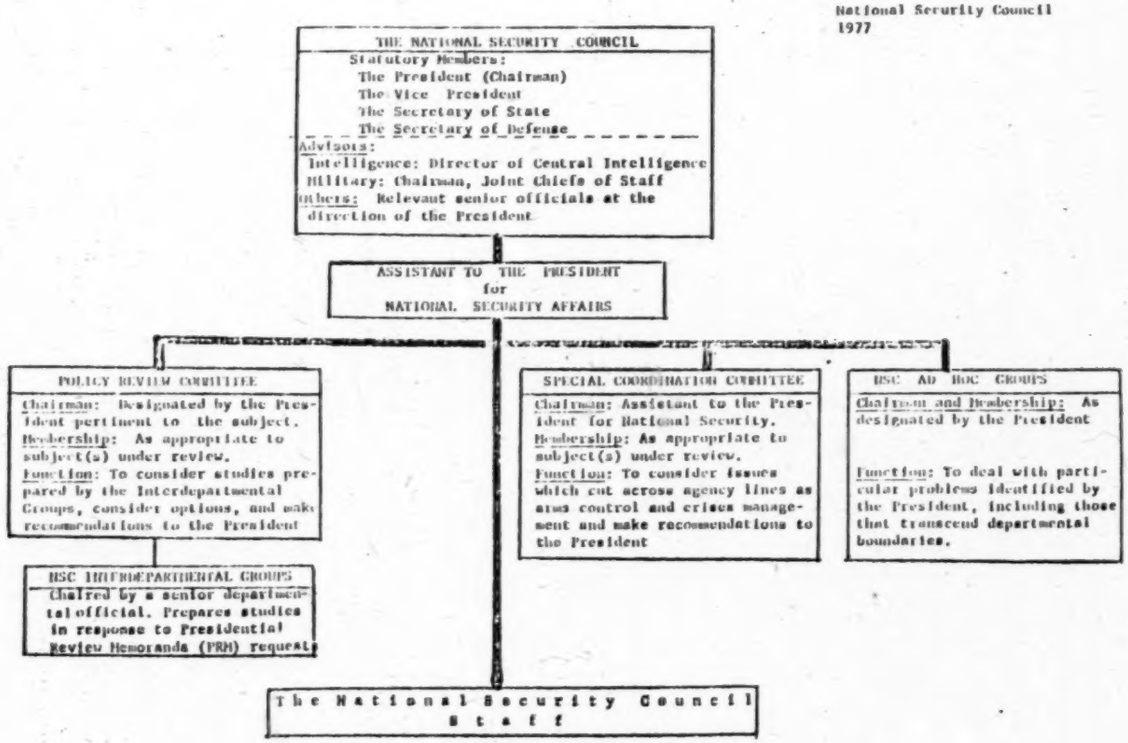
EXHIBIT "B"

ORGANIZATION & FUNCTIONS

National Security Council
1977



279a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants.	)	

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0391
DEPARTMENT OF STATE, et al., Defendants.	)	

AFFIDAVIT OF WILLIAM E. LEUCHTENBURG

CITY OF NEW YORK)
STATE OF NEW YORK) ss

I, William E. Leuchtenburg, being duly sworn, depose and say:

1. I am a plaintiff in this action, a member of the American Historical Association, also a plaintiff in this action, and DeWitt Clinton Professor of American History at Columbia University. I have been involved in research in the Presidential Archives at the Franklin D. Roosevelt, Harry S. Truman, John F. Kennedy, and Lyndon B. Johnson Libraries, and have written several books and articles on the American Presidency.

2. Under a contract with Oxford University Press, I am now writing the final volume of the *Oxford History of the United States*, which will concern the period 1945 to the present and embrace both the Nixon and Ford Administrations. I expect that this volume will be 200,000 words in length and will examine the events of the last two Administrations in extremely great detail.

3. I also have a contract with the Oxford University Press for a major revision of *The Growth of the American Republic*, which will be updated to cover the Nixon and Ford Administrations. I am scheduled to complete this revision within the next several months.

4. I am also the author of *A Troubled Feast*, published by Little, Brown & Co., which covers the first term of the Nixon Presidency. I am now under contract to update this book to cover the second term of the Nixon Presidency and the Ford Presidency. My revised version of the book is due to be delivered to Little, Brown in June of this year.

5. In order to meet these contractual and scholarly commitments, it is extremely desirable that I have timely access to the transcribed secretarial notes of Mr. Henry A. Kissinger's official telephone conversations as Secretary of State that are the subject of the Court's order of January 24, 1978. These notes represent a first-hand source of information about the Nixon and Ford Administrations that is invaluable. Without the notes, my ability to analyze the development and implementation of American foreign policy during the last eight years will be seriously impaired. I will be at a particularly great disadvantage in attempting to

write the final volume of the *Oxford History of the United States*, which will recount the government activities in which Mr. Kissinger participated in extremely great detail and therefore could benefit considerably from the daily account of important events and decisions that the notes of Mr. Kissinger's conversations will provide.

6. Because I am now at work on all three books, it would be a serious setback if I could not obtain access to the notes for another eighteen months to two years while an appeal in this case is pending. During this period, I expect to either finish or make substantial progress on each book. Accordingly, access to the notes will either come too late to be reflected in my final product or will require substantial rewriting and revision, with a resulting waste of time and effort.

7. It will be extremely unfortunate if Mr. Kissinger is able to use the notes of his official conversations for his own scholarly and commercial purposes while I am denied access to them. Mr. Kissinger's memoirs, articles and television appearances will have an important advantage over my own publications because they are based on a major historical source which I was unable to consult. In addition, the exclusive availability of these materials to Mr. Kissinger will make it difficult for historians such as myself to challenge his version of his actions during the Nixon and Ford Administrations and, thus, to provide the American public with an even-handed and balanced analysis of the last eight years. Accordingly, I believe that the continued unavailability of the notes during an appeal of this case will have a serious adverse effect on all informed members of the public.

/s/ William E. Leuchtenburg
William E. Leuchtenburg

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs, v. CYRUS R. VANCE, et al., Defendants.	)	Civil No. 77-0220

MILITARY AUDIT PROJECT, et al., Plaintiffs, v. DEPARTMENT OF STATE, et al., Defendants.	)	Civil No. 77-0391

AFFIDAVIT OF DR. MACK THOMPSON

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss

I, Mack Thompson, being duly sworn, depose and say:

1. Since 1974, I have served as Executive Director of the American Historical Association (A.H.A.), a plaintiff in this

action. The A.H.A. is the principal spokesman for professional historians in this country. It was chartered by the Congress in 1889 for the purpose of the "promotion of historical studies, the collection of historical manuscripts, and for kindred purposes in the interest of American history". The constitution of the A.H.A. reflects the Association's commitment to insuring the fullest availability of historical sources to scholars and students of American history. Under that constitution, a major activity of the Association is to "encourage the collection and preservation of historical documents and insure equal access to information." In order to further these purposes, the A.H.A. became a plaintiff in this lawsuit.

2. As Executive Director of the A.H.A. and a historian of American history of twenty years standing, I am intimately familiar with the activities, needs and concerns of students and scholars of American history in this country. Based on my background and experience, it is clear to me that the notes of Mr. Henry Kissinger's official telephone conversations as Secretary of State constitute first-hand source material that is invaluable for any historian interested in recent American history. If these notes continue to be unavailable for a period of one-to-two years while an appeal in this case is pending, the many undergraduates, graduate students and professional scholars who are studying, conducting research on, or writing about the Nixon and Ford Administrations will sustain serious harm. Without access to the notes, there is a real risk that efforts to understand these Administrations will be thwarted significantly.

3. In order to document the serious consequences of postponing access to the notes while an appeal of this case is pending, I contacted the following three prominent historians, each of whom confirmed that the continued unavailability of the notes would represent a considerable scholarly disadvantage:

(a) Frank Freidel is Charles Warren Professor of

American History at Harvard University. In addition to his other publications, Professor Freidel is the author of *America in the Twentieth Century*, (4th Ed. 1976), published by Random House. Professor Freidel is under contract to update this book and will probably commence this project shortly. Without access to the notes, he believes that he will lose the opportunity to draw on a valuable and illuminating set of source materials concerning foreign and domestic policy during the Nixon and Ford Administrations. Since *America in the Twentieth Century* is a standard text used by students at many levels, Professor Freidel's inability to use the notes may very well impair the efforts of teachers to describe and analyze the events of the last eight years.

(b) Arthur Link is Edwards Professor of American History at Princeton University. He has authored many books on American politics in the twentieth century and is especially known for his interest in Woodrow Wilson and William Jennings Bryan. Professor Link is a co-author of *American Epoch: A History of the United States Since 1900* (1974). Like Professor Freidel, Professor Link will be revising this book in the near future to reflect the impact of the Ford and Nixon Administrations. He believes that this task will be substantially impaired if the day-by-day account of these Administrations provided by the notes of Mr. Kisinger's conversations is unavailable to him. Since his book, too, is widely used by students, his lack of access to the notes will also have an adverse effect on the teaching of American history.

(c) James T. Patterson is Professor of History at Brown University. He is the author of *America in the Twentieth Century: A History* (1976). Like Professors Freidel and Link, he will shortly begin a revision of this book. In his view, the unavailability of a historical source as important and illuminating as the notes will have a serious adverse im-

pact on the quality of this project. His book, too, is a basic text widely used by students at all levels.

4. It would great compound the injury sustained by these and other scholars if Mr. Kissinger has the opportunity to use these notes for scholarly and commercial purposes of his own while professional historians are denied access to them. Mr. Kissinger's publication of books or articles based on this highly reliable and authentic source of information which is unavailable to others will make the efforts of historians less valuable, financially and intellectually. In addition, the exclusive availability of the notes to Mr. Kissinger will enable him to present a portrayal of his actions during the Nixon and Ford Administrations that historians will find it difficult to challenge. As a result, the historical profession will find it difficult tu fulfill its responsibility of providing the American public with an even-handed and balanced analysis of the last two Administrations.

/s/ Mack Thompson
Dr. Mack Thompson

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0220
CYRUS R. VANCE, et al., Defendants.	)	

MILITARY AUDIT PROJECT, et al., Plaintiffs,	)	
v.	)	Civil No. 77-0391
DEPARTMENT OF STATE, et al., Defendants.	)	

AFFIDAVIT OF EVRON M. KIRKPATRICK

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss

I, Evron M. Kirkpatrick, depose and say:

1. For the last twenty-four years, I have served as Executive Director of the American Political Science

Association (A.P.S.A.), a plaintiff in this action. The A.P.S.A. was founded in 1903 and, since that time, has functioned as the principal representative of political scientists in this country. The Association is non-partisan and educational in orientation and currently has 12,000 members, all of whom have some background and professional interest in political science. Among its goals, the Association is committed to insuring open access to research materials that are of value to students of American politics and foreign relations. It was to further this purpose that the Association became a plaintiff in this lawsuit.

2. As the Association's Executive Director and a trained political scientist with both research and teaching experience, I am knowledgeable about the pursuits, interests and concerns of political scientists in this country. It is my judgment that the notes of Mr. Henry Kissinger's official telephone conversations as Secretary of State would, if available, provide extremely valuable source material for all political scientists interested in international affairs or American politics. If these notes continue to be unavailable for a further extended period during the pendency of an appeal in this case, the many political scientists who are interested in these subjects will sustain serious harm.

3. In order to determine the impact on political scientists of postponing access to the notes during an appeal of this case, the Association contacted the following prominent political scientists, each of whom advised us that the continued unavailability of the notes would place them at a significant scholarly disadvantage:

(a) Bernard Cohen is Professor of Political Science at the University of Wisconsin in Madison. Professor Cohen is the author of several books on public opinion and foreign policy, including the *Press & Foreign Policy* (1963), the *Political Process and Foreign Policy* (1957), *Citizen Education in World Affairs* (1953) and

Foreign Policy in American Government (1965). Without access to the notes, Professor Cohen believes he will be at a serious disadvantage in conducting research on, and writing and teaching about, American foreign policy and public opinion during the Nixon and Ford Administrations.

(b) Robert Axelrod is Professor of Political Science at the University of Michigan. Among his areas of specialization is foreign and military policy and he is the author of several books and articles on this subject. Professor Axelrod believes that his teaching, research and writing activities in the area of foreign affairs will be impeded without access to the notes.

(c) H. Bradford Westerfield is Professor of Political Science at Yale University. His principal areas of interest are international politics and foreign and military policy. He has written several books and articles on these subjects, many of which concern various aspects of national security and foreign policy during the Nixon and Ford Administrations. Professor Westerfield will be at a serious disadvantage in teaching and writing about these matters if he is denied access to the notes of Mr. Kissinger's conversations for an extended additional period.

4. It would greatly compound the injury sustained by these and other scholars if Mr. Kissinger has the opportunity to use these notes for scholarly and commercial purposes of his own while professional political scientists are denied access to them. Mr. Kissinger's publication of books or articles based on this highly reliable and authentic source of information which is unavailable to others will make the efforts of political scientists less valuable, financially and intellectually. In addition, the exclusive

availability of the notes to Mr. Kissinger will enable him to present a portrayal of his actions during the Nixon and Ford Administrations that political scientists will find it difficult to challenge. As a result, the political science profession will find it difficult to fulfill its responsibility of providing the American public with an even-handed and balanced analysis of the last two Administrations.

/s/ Evron M. Kirkpatrick
Evron M. Kirkpatrick

[Jurat omitted in printing]

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Supreme Court, U. S.
FILED
MAR 30 1979
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Nos. 78-1088 and 78-1217

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY A. KISSINGER, PETITIONER

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PETITIONERS

v.

HENRY A. KISSINGER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1088

HENRY A. KISSINGER, PETITIONER

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

No. 78-1217

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PETITIONERS

v.

HENRY A. KISSINGER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49a-50a)[1] is not reported. The opinion of the district court (Pet. App. 51a-58a) is reported at 442 F. Supp. 383.

[1] "Pet. App." refers to the appendix to the petition in No. 78-1088.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a-48a) was entered on November 7, 1978. The petition for a writ of certiorari in No. 78-1088 was filed on January 8, 1979, and the petition in No. 78-1217 was filed on February 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether documents that are not in the possession of an "agency" when a request for their production is filed under the Freedom of Information Act must be retrieved so that they can be processed by the agency for release (both petitions).

2. Whether transcripts of telephone conversations of a former Secretary of State are appropriate documents for retrieval, if such retrieval authority exists (No. 78-1088).

3. Whether review of the transcripts at issue in this case for possible disclosure would violate the constitutional expectation of privacy of petitioner Kissinger (No. 78-1088).

4. Whether the National Security Council is an "agency" and, if so, whether requests for documents created by the head of that agency must be presented to the NSC rather than to the Department of State (No. 78-1217).

STATEMENT

Petitioner Henry A. Kissinger served as National Security Adviser from January 20, 1968, until November 3, 1975. On September 22, 1973, he assumed the office of Secretary of State, which he held until January 1977 (Pet. App. 52a). Throughout that period, Kissinger's secretaries monitored his telephone conversations and prepared transcribed notes of those conversations. At both the White House and the State Department, the notes were

stored in Kissinger's office and kept separate from official agency files (Pet. App. 52a).

Before leaving office, Kissinger decided to donate to the United States some of his papers, including the transcribed notes of his telephone conversations. The State Department's Legal Adviser concluded that the notes were not State Department documents, but rather were Kissinger's personal papers. Late in 1976 he removed the notes from the State Department and donated them to the Library of Congress. (Excerpts and summaries of the portions of the transcripts related to official business were retained by the State Department.) Under the terms of the deed, public access to the notes is to be restricted for 25 years or until five years after Kissinger's death, whichever comes later (Pet. App. 52a-53a).

After the notes had been removed from the State Department, several persons filed a series of Freedom of Information Act requests with the State Department, seeking to obtain copies of the notes prepared throughout the period that Kissinger served as National Security Adviser, as Secretary of State, and in both positions. The State Department denied the request.

The requesters[2] then filed this action in the United States District Court for the District of Columbia, seeking to have the notes returned to the State Department and disclosed to them under the Freedom of Information Act. The district court granted relief with respect to the notes Kissinger had prepared while serving at the State Department, but not with respect to those he had had prepared while serving at the White House (Pet. App. 59a-61a). The court ordered Kissinger, the Department of State, and the Librarian of Congress to transfer the notes from the Library of Congress to the custody of the State

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[2]We refer to the private respondents in No. 78-1088 and the petitioners in No. 78-1217 as the requesters.

Department. The State Department was ordered to determine which of the transcribed notes are required to be released under the Freedom of Information Act and to give Kissinger and other parties to his telephone conversations an opportunity to resist discretionary disclosure of any notes that are exempt from mandatory disclosure under the Act. Those notes determined to be subject to mandatory disclosure, the court held, must be released to the requesters.

The district court held that it was authorized to order the transfer of records to the Department of State as a consequence of its "broad equitable powers granted * * * in aid of [its] role as the 'enforcement arm' of the Freedom of Information Act" (Pet. App. 55a). Therefore, even though the Library of Congress is not subject to the Freedom of Information Act (see 5 U.S.C. 552(e)), the court held that it could order the return of the notes Kissinger had donated to the Library of Congress. The exercise of this power was appropriate in this case, the court held, because, in the court's view, the transcripts of the conversations held in the State Department are agency documents that Kissinger had wrongfully removed, and because it appeared unlikely that the Administrator of General Services would file an action seeking recovery of the documents under 44 U.S.C. 3106. The court further held that these notes had been prepared in the discharge of Kissinger's official duties and are therefore United States property, which should not have been removed from the State Department.

Both sides took appeals, and the court of appeals affirmed.[3] With respect to the notes of telephone conversations prepared while Kissinger was serving as

[3]This Court granted a stay of the district court's retrieval and processing order pending final disposition of the appeal. 435 U.S. 993 (1978). Retrieval has been further postponed pending this Court's disposition of the petitions for certiorari.

National Security Adviser, prior to his appointment as Secretary of State, the court of appeals held that the Freedom of Information Act does not extend to close Presidential advisers such as the National Security Adviser and that the relocation of those notes to the State Department did not, without more, render them State Department records obtainable by means of a Freedom of Information Act request to that Department[4] (Pet. App. 49a-50a). Without discussion, the court also affirmed the portions of the district court's order requiring that the notes prepared while petitioner was serving as Secretary of State be returned to the State Department and that those notes be disclosed to respondents in accordance with the provisions of the Freedom of Information Act (Pet. App. 49a).

DISCUSSION

1. The Freedom of Information Act requires agencies covered by the Act to make available agency records on request unless those records are exempt from mandatory disclosure. See 5 U.S.C. 552(a)(3) and 552(b). The Act further empowers district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant" (5 U.S.C. 552(a)(4)(B)). The important question raised by these two petitions is whether the Act requires production of records that have at some time been in the agency's possession, but are not in the agency's possession at the time that the FOIA request is made or the FOIA complaint filed in district court.

[4]The court also noted that respondents' speculation that the earlier transcripts might concern the affairs of the National Security Council adds nothing to their claims, because no Freedom of Information Act request was made of the National Security Council (Pet. App. 50a).

The transcribed notes of Kissinger's conversations were not in the custody or control of the State Department at the time the FOIA requests were made. The notes at issue in No. 78-1088 had been prepared at the State Department and then removed prior to the time the FOIA requests were filed with that agency. The notes at issue in No. 78-1217 were prepared elsewhere and had simply been kept at the State Department for a period of time before being removed, also prior to the time the FOIA requests were filed. The district court and the court of appeals nonetheless held that the FOIA authorized the court to order the return of the notes from the Library of Congress—which is not an "agency" for purposes of the Freedom of Information Act—on the ground that the notes had been wrongfully removed from the State Department.

It is well established that the FOIA does not require agencies to create records; it merely requires the production of records in the agency's possession. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975); *Renegotiation Board* v. *Grumman Aircraft* Engineering Corp., 421 U.S. 168, 192 (1975). Nothing in the FOIA requires an agency to keep any documents that it possesses. Because the Act applies only to existing records, it ordinarily does not authorize a court to order the return of records that are no longer in the possession of an agency. A Freedom of Information Act request entitles the requesting party to examine those agency records in the agency's possession at the time the request is made; it does not impose on the agency an obligation to retrieve records not in its possession. See (*Ciba-Geigy Corp.* v. *Mathews*, 428 F. Supp. 523, 531 (S.D.N.Y. 1977); *Nichols* v. *United States*, 325 F. Supp. 130, 137 (D. Kan. 1971), aff'd, 460 F. 2d 671 (10th Cir.), cert. denied, 409 U.S. 966 (1972). As was stated in the Attorney General's contemporaneous memorandum explaining the provisions of the FOIA, the Act "refers * * * only to

records in being and in the possession or control of an agency. The requirement of this subsection imposes no obligation to compile or procure a record in response to a request." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23-24 (June 1967).

The district court relied on *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), as authority for its order directing the return of the notes to the Department of State. *Bannercraft*, however, does not support that order. Equitable authority to enforce the substantive provisions of the FOIA is quite different from authority to enlarge the Act's substantive reach. In *Bannercraft* the Court held that the provision of equitable jurisdiction in the FOIA authorizes a district court to grant injunctive relief where it is necessary to enforce the Act, even if the particular form of injunctive relief granted is not specifically authorized by the Act. This principle, we submit, would permit a court to order the return of agency records removed after the filing of an FOIA request for those records. An injunction could be appropriate in such a case because the act of removing records from the agency after an FOIA request is filed could constitute "withholding agency records" from the complainant, which is prohibited by the Act. See 5 U.S.C. 552(a)(4)(B). But the *Bannercraft* principle does not authorize an injunction ordering the retrieval of records that were not in the agency's possession at the time of the FOIA request, because the Act was not intended to reach such materials. Records that were removed from the agency before the FOIA request was filed are not being "improperly withheld from the complainant" within the meaning of the Act. A retrieval order therefore would not promote the purposes or policies of the FOIA, but rather would impose on the agency a new obligation, not found in the FOIA, to go beyond simply producing records that are in its possession.

Under the analysis we have set out, the district court and court of appeals were correct in holding that the Department of State need not retrieve the transcripts of Kissinger's White House conversations, and failed to articulate any theory that would justify their holding that the Department must retrieve the transcripts of the conversations held after Kissinger became Secretary of State. Absent exceptional circumstances, such documents should be treated alike because none was in the possession of an "agency" for FOIA purposes at the time a request for production under FOIA was received by the Department of State. Although there is an interesting difference in the status of the transcripts—those at stake in No. 78-1088 were created within the Department of State, while those at stake in No. 78-1217 were created outside a FOIA "agency"[5] and were present in the Department of State for only a few years before their removal—that difference is unimportant to the scope of the FOIA.

We agree with petitioners that the question whether the FOIA requires the processing and production of records that were not in the possession of an "agency" at the time of a request for production is of sufficient general

[5]Petitioners in No. 78-1217 apparently concede this point (Pet. 6-7), at least with respect to notes of Kissinger's White House conversations that do not pertain to his role as head of the National Security Council. They argue, however, that the NSC is an "agency" and that they are therefore entitled to the notes that "relate to the affairs of the NSC" (Pet. 11). The court of appeals, without deciding whether the NSC is an "agency" for purposes of the FOIA, held that the requesters' claim must fail because they did not present a request to the NSC. There is no need for the Court to review the requesters' challenge to this holding. The question whether the NSC is an "agency" apparently is being litigated here for the first time, and neither the district court nor the court of appeals addressed the question in detail. There is, moreover, a serious question whether notes that simply "relate to the affairs of the NSC" would be treated as "agency records" even if NSC is an agency. Kissinger was not simply the head of the NSC; he was the President's closest personal adviser on foreign affairs, and his own notes would not be "agency" documents no matter what the status of his subordinates' documents. And the question whether a request under the FOIA must be presented to the agency whose documents are sought not only has received little attention but also is not properly presented by this case. It would be one thing if NSC documents, in the possession of the State Department, were sought by a request to the State Department. It is quite another to say that a requester can seek NSC documents by request to the State Department where, as here, they are *not* in possession of the State Department. There will be time enough to consider the second question presented in No. 78-1217 if a request is made to an "agency" that, at the time of the request, actually has possession of agency records created by some other agency.

importance to warrant review by this Court. The question potentially affects the operations of every federal agency, and it will recur until this Court addresses it. Millions of documents pass in and out of the files of federal agencies daily. If agencies must retrieve and process every document that they create, or that they ever possessed, their duties under the FOIA will be substantially increased. Review is particularly appropriate here because the District of Columbia Circuit, which reviews substantial numbers of FOIA cases, has created an illogical distinction between documents created within an agency and documents that passed through an agency.[6]

2. Our argument to this point has assumed that the transcripts of Kissinger's conversations in the State Department were agency records at the time of their creation, and that the transcripts of Kissinger's conversations in the White House, although not agency records when created, became agency records when moved to the

[6]The question whether agencies must retrieve documents that were once in their possession is closely related to the question, which is presented in *Forsham* v. *Califano*, No. 78-1118, whether the FOIA requires agencies to obtain documents that were never in their possession. For the reasons stated in our response to the petition in No. 78-1118, we believe that the Court should grant review of that case and set it for argument in tandem with the present case. (We have furnished copies of our response in No. 78-1118 to counsel for petitioners in this case.)

State Department. We have argued that the transcripts are not disclosable under the FOIA even on this assumption, which the district court and the court of appeals shared. Petitioner Kissinger maintains, however, that this assumption is unwarranted, and that the transcripts never were agency records and were properly removed. Consequently, he argues, a district court cannot order retrieval of the transcripts even if it has the power to order the retrieval of agency records. We believe that this question is not sufficiently important to warrant review.

The Freedom of Information Act does not define the meaning of "records," and so the dispute in this case has centered about the Federal Records Act, 44 U.S.C. 3301 *et seq.* The definition of "records" in that Act includes "documentary materials, regardless of physical form or characteristics, made or received by an agency * * * in connection with the transaction of public business and preserved or appropriate for preservation by that agency * * * as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them" (44 U.S.C. 3301). It is undisputed that the notes at issue here include many conversations relating directly to the transaction of public business. Moreover, the notes were preserved in part to provide a record of the functions, policies, and decisions of the government. Accordingly, at least some of the transcribed notes of Kissinger's telephone conversations are federal records under the definition in 44 U.S.C. 3301.

Kissinger contends that even if the notes constituted agency records, they were not improperly removed from the State Department.[7] In our view, however, it is not

[7]The propriety of the disposal of agency records is governed by 44 U.S.C. 3301-3324, and the disposal procedures are overseen by the Administrator of General Services. See 44 U.S.C. 3303a.

necessary for this Court to determine whether the notes were improperly removed. That question is substantially tied to the facts of this case. Moreover, the inquiry is not relevant to the question whether the notes can be obtained by a requester under the Freedom of Information Act. If a particular record has been removed from an agency in violation of the Federal Records Act, the proper remedy is a retrieval action under the Records Act (see 44 U.S.C. 2905, 3106). A plaintiff in a FOIA suit gains no additional rights on account of an alleged violation of the Records Act, so long as the alleged violation of the Records Act has not also violated the requester's rights under the Freedom of Information Act. Because the notes at issue in this case were removed from the State Department before the present FOIA requests were filed, the removal of the notes did not violate respondents' rights under the FOIA, even if the removal was improper under the Federal Records Act.

3. Petitioner Kissinger further contends (78-1088 Pet. 24-27) that the district court's order violates his constitutional rights of privacy. Whatever the merits of the claim may be, it is premature. The district court's order provides that, after the notes are returned to the State Department, petitioner shall be given an opportunity to object to the release of any portions of the notes that are exempt from mandatory disclosure because they contain matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (see 5 U.S.C. 552(b)(6)). Accordingly, even if the district court's order is sustained, Kissinger will have a further opportunity to raise his constitutional objections to the release of any materials in which he has a significant privacy interest, if the Department decides to release any such materials at the conclusion of its review of the notes. The review process in itself does not violate any constitutional right of privacy, for the same reasons that the analogous review process was upheld in *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455-465 (1977).

CONCLUSION

The petitions for a writ of certiorari should be granted. The Court should limit the grant to the first question presented by each petition, and it should consolidate the cases. The cases should be set for argument in tandem with *Forsham* v. *Califano,* No. 78-1118.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

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Supreme Court, U. S.
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78-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1008

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

HENRY A. KISSINGER,

Petitioner,

v.

MILITARY AUDIT PROJECT, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL. IN OPPOSITION

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IN THE

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HENRY A. KISSINGER,

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v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL. IN OPPOSITION

This Brief is submitted by the Reporters Committee for Freedom of the Press and its eleven co-respondents in opposition to Mr. Henry Kissinger's petition for a writ of certiorari.[1]

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[1] In addition to the Reporters Committee, respondents include the American Historical Association, the American Political Science Association, Professors William Leuchtenburg, Clement Vose, James MacGregor Burns, Arthur Link, Austin Ranney and Donald Herzberg, and columnists William Safire, Nat Hentoff and J. Anthony Lukas. Respondents are concurrently cross-petitioning this Court for a writ of certiorari to review the portion of the lower court's decision that was adverse to them.

QUESTIONS PRESENTED

1. Are transcripts of the official telephone conversations of the Secretary of State — prepared expressly to aid him in performing his governmental duties — "records" of the State Department under established property law principles, Department regulations, the Federal Records Act, and regulations promulgated by the General Services Adminsitration under that Act?

2. Do the requirements of the Freedom of Information Act apply to records that were unlawfully removed from State Department custody and remain its property in every respect except physical location and, if so, could the District Court exercise its equitable powers to compel the Department to repossess those records for processing and disclosure under the Act?

3. Could the District Court require Department record officers to review those portions of the transcripts that touch on personal matters in order to insure that all official discussions recorded in the transcripts are identified and screened for possible disclosure under the Freedom of Information Act?

STATEMENT OF THE CASE

Facts

During his eight years as Assistant to the President and Secretary of State, Henry A. Kissinger's secretaries routinely monitored his telephone conversations and recorded their contents either by shorthand or on tape. These rough notes were then transformed into detailed, often verbatim transcripts. The secretaries participating in this process were all government employees; the typewriters and monitoring equipment they employed were owned by the government; and the notes they prepared were transcribed on government time and in government offices. After their

preparation, the notes were retained in the normal course of government business and stored in White House and, later, State Department files.[2]

Mr. Kissinger kept this detailed record of his conversations to assist him and his staff in performing their official responsibilities. He himself has characterized the notes as "work-aids to ease the administrative burdens" of his job (Pet. App. 74a), and acknowledged that they were "prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted." JA 47. Moreover, under State Department regulations, "discussions of any significance which are oral in nature", including telephone calls, must be made a matter of record, 5 FAM § 423.2-1, and, during Mr. Kissinger's tenure as Secretary, the Department forbade the monitoring of telephone conversations except when "deemed absolutely essential to the conduct of business." JA 129.

In October 1976, at the close of the Ford Administration, Mr. Kissinger arranged for the removal of the secretarial notes from the State Department to the New York estate of the late Nelson Rockefeller. Pet. App. 76a-77a. Before this action was taken, Department officials responsible for records preservation and archivists of the General Services Administration ("GSA") neither reviewed the notes nor authorized their disposal. Pet. App. 76a. Weeks after their removal, Mr. Kissinger obtained a written opinion of the Department's Legal Adviser that the notes were private papers which he could dispose of as he saw fit. *Id.*

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[2]Second Affidavit of Henry A. Kissinger ("Kissinger Aff."), ¶¶ 3-5, reproduced in the Appendix to Mr. Kissinger's Petition ("Pet. App.") at 73a-75a. The pertinent facts relating to the notes can also be found in the opinion of the District Court, Pet. App. 52a-56a, and in various portions of the Joint Appendix ("JA") filed in the Court of Appeals. *See* JA 91-95, 154-164.

On November 12, 1976, Mr. Kissinger entered into a Deed of Gift and Agreement with the Library of Congress. JA 55-61. By this Agreement, Mr. Kissinger donated to the Library a collection of personal and governmental papers dating from his Harvard University period as well as his years with the government. Except when Mr. Kissinger decides otherwise, the Agreement prohibits public access to these materials until the passage of 25 years or 5 years from his death, whichever is later. JA 57.[3] At the same time, however, the Agreement assures Mr. Kissinger and his research assistants unrestricted use of the collection. JA 58.

On December 24, 1976, Mr. Kissinger and the Library entered into a Second Deed of Gift and Agreement under which Mr. Kissinger donated to the Library the transcribed notes of his telephone conversations as well. JA 61. The Second Agreement incorporates by reference all the terms and conditions of the First Agreement, including its prohibition on public disclosure, and further provides that public access to the notes will be permitted only with the consent, or upon the death, of the other party to the telephone conversation in question.

On December 28, 1976, the notes were transported directly to the Library from the Rockefeller estate. Pet. App. 78a. Soon afterward, in two separate letters, the Archivist of the United States informed Mr. Kissinger that the notes might constitute official State Department records which Mr. Kissinger had no authority to remove. Citing his

[3]At the same time that the First Agreement was executed, a memorandum entitled "Donation Procedures" was prepared which provided for representatives of the Department's Document Center to review Mr. Kissinger's files and remove all Department records for retention by the Department. JA 267-269. However, while Mr. Kissinger's working files were reviewed by Department records officers pursuant to this memorandum, the notes of his telephone conversations remained at the Rockefeller estate and, thus, were never subjected to the same inspection as Mr. Kissinger's working files. As a result, the Department had no opportunity to identify notes of conversations that it wanted to preserve.

statutory responsibility to oversee the preservation of historic federal records, the Archivist asked Mr. Kissinger to permit GSA archivists to inspect the notes in order to ascertain their proper owner. JA 62-63, 108-122. On each occasion, Mr. Kissinger rejected the Archivist's proposal.

Proceedings In the Courts Below

In early 1976, while the notes remained in Department custody, respondent William Safire unsuccessfully sought access under the Freedom of Information Act ("FOIA") to the transcripts of certain conversations between Mr. Kissinger and other government officials. JA 173-178. Then, on January 13, 1977, after the notes had been transferred to the Library, the eleven other respondents filed an unsuccessful FOIA request with the Department that encompassed the notes in their entirety. JA 71-74, 75-77. Soon thereafter, respondents filed suit in the District Court, seeking an order requiring the Department to repossess the notes and review them for disclosure in accordance with the FOIA.

On December 8, 1977, Judge John Lewis Smith issued an Opinion ruling on the parties' cross-motions for summary judgment.[4] That Opinion emphasized that "State Department regulations require documentation of all official activities", including telephone conversations, and that the

[4]The government defendants initially opposed these motions and filed a motion for the production of documents which, if granted, would have allowed GSA and State Department archivists to inspect the notes. JA 190-92. Subsequently, however, the government defendants and Mr. Kissinger entered into an agreement which provided for the inspection of selected samples of the notes. The government defendants thereupon withdrew their opposition to Mr. Kissinger's summary judgment motion on the ground that their interests were adequately protected by the inspection agreement. JA 274-279. Nevertheless, they made no concession that the notes were no longer State Department records or that their removal from Department custody had been lawful.

"significance of the commitments, decisions, and discussions embodied in [Mr. Kissinger's] conversations is apparent from the stature of the other parties to them." Pet. App. 56a. The Opinion then invoked the established doctrine that "work created by an employee within the scope of employment is the property of the employer". Pet. App. 56a-57a. Based on this doctrine, it held that, "having been prepared and transcribed 'in the discharge of his official duties', the notes are property" of the Department of State which Mr. Kissinger had "wrongfully removed" from Department custody. Pet. App. 58a. Since the notes had never ceased to be "records" of the Department, Judge Smith further held that he would exercise the equitable powers granted the district courts as the "enforcement arm" of the FOIA and return the notes to the Department for review and disclosure in accordance with the Act. Pet. App. 55a.[5]

To implement his Opinion, Judge Smith issued an Order on January 25, 1978 which directs the Department to repossess the notes of Mr. Kissinger's conversations as Secretary of State and determine which portions are subject to mandatory FOIA disclosure and which may be withheld under the FOIA's exemptions. Pet. App. 59a-61a.[6] Transcripts which the Department decides to disclose must then be inspected by Mr. Kissinger, who can ask the district court to restrain disclosure on the basis of FOIA exemption

[5]Respondents' original FOIA requests and Complaint encompassed the notes of Mr. Kissinger's conversations as Special Assistant to the President. Referring to these notes only in passing, however, Judge Smith's Opinion commented that respondents had withdrawn their claim to them at oral argument. Pet. App. 55a. After the Opinion was issued, respondents promptly moved for clarification, pointing out that, according to the transcript, Judge Smith's recollection of oral argument was in error.

[6]Without further comment, this Order also denies plaintiffs' motion for summary judgment insofar as it concerned the notes of Mr. Kissinger's White House conversations.

(b)(6), which applies to agency records whose release would "constitute a clearly unwarranted invasion of personal privacy."

Mr. Kissinger, but not the government defendants, appealed from the District Court's Order to the Court of Appeals.[7] On November 7, 1978, the Court issued a *per curiam* Judgment affirming the decision of the District Court. In a brief accompanying Memorandum, the Court stated that, because the government had not appealed, "a judgment affirming the District Court on the ownership issue may make consideration of most of the other issues Mr. Kissinger raises unnecessary." Nevertheless, the Court emphasized that it was "in full agreement on all issues" with the decision of the District Court. Pet. App. 49a.[8]

[7]In the Court of Appeals, the government chose to participate as an amicus curiae. Contrary to the impression created by Mr. Kissinger's Petition, the government's brief did not support his position but, instead, presented a legal analysis which, if accepted, would have required the case to be remanded for further proceedings.

[8]The Court also affirmed the District Court insofar as it had refused relief concerning those portions of the notes which reflected Mr. Kissinger's telephone conversations as Assistant to the President. Pet. App. 49a. The Court's rationale for this holding is described in the separate Cross-Petition for a Writ of Certiorari which the Reporters Committee and its co-respondents are concurrently filing with the Court in order to obtain review of this aspect of the lower court's decision.

REASONS FOR DENYING THE WRIT

A. The Lower Courts Correctly Determined That The Notes Were State Department "Records" That Mr. Kissinger Had Unlawfully Removed

The district court's decision rested on the basic doctrine that materials generated in the course of a government employee's official duties belong to the government agency for which they were produced, not the individual employee. This doctrine is embedded in a large and long-standing body of case law. It is also embedded in the very State Department regulations on which Mr. Kissinger purports to rely, the Federal Records Act, and the government-wide regulations that GSA has promulgated under that Act. Under the Federal Records Act, official records can only be removed from government custody if the originating agency and GSA concur that they are no longer needed for the transaction of public business. Removal of official records at the whim of a retiring employee is an overt violation of the procedure for records disposition prescribed by Congress.

1. In the private sector, it is well-established that an employer is the owner of a work created by his employees within the scope of their employment. *E.g., Scherr* v. *Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert denied*, 397 U.S. 936 (1970); *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565, 567-58 (2d Cir, 1966); *Nelson* v. *Radio Corporation of America, Inc.*, 148 F. Supp. 1, 3 (S.D. Fla. 1957). As numerous decisions recognize, the considerations underlying this doctrine apply with even greater force to public employment, where the work product of employees may often have major significance for society as a whole.

In *United States* v. *First Trust Co. of St. Paul*, 251 F.2d 686, 688 (8th Cir. 1958), for example, the court held that, if

materials "are the written records of a government officer executed in the discharge of his official duties, they are public documents and ownership is in the United States." More recently, in a case involving the materials of Richard Nixon's presidency, the District Court for the District of Columbia re-affirmed the "general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the individual." *Nixon* v. *Sampson*, 389 F. Supp. 107, 133 (D.D.C. 1975), *stayed sub nom. Nixon* v. *Richey*, 513 F.2d 430, *dismissed as moot*, 437 F. Supp. 654, *rev'd. and remanded*, No. 77-2123 (D.C. Cir. December 21, 1978). *See also Sawyer* v. *Crowell Publishing Co.*, 46 F. Supp. 471 (S.D.N.Y. 1942), *aff'd.* 142 F.2d 497 (2d Cir. 1944), *cert. denied*, 323 U.S. 735 (1944).

Reflecting these basic principles is *Public Affairs Associates, Inc.* v. *Rickover*, 268 F. Supp. 444 (D.D.C. 1967), a case where Admiral Rickover sought to prevent the publication of certain speeches without his permission on the basis that they were his own property. After the district court and the court of appeals had decided the case on narrow grounds of copyright law, this Court granted certiorari and, in remanding for further proceedings, emphasized that the case presented

> ". . . matters of serious public concern. They relate to claims to intellectual property arising out of public employment. They thus raise questions touching the responsibilities and immunities of those engaged in public service, particularly high officers, and the rightful demands of the government and the public upon those serving it." 369 U.S. at 112-113.

The Court directed the District Court to determine "the circumstances of the preparation and of the delivery of the

speeches in controversy in relation to the Vice-Admiral's official duties." *Id.* Obeying this directive, the District Court held on remand that "[t]he fundamental determination . . . is whether the disputed speeches fall within the purview of Admiral Rickover's official duties," 268 F. Supp. at 448, and "[i]n this context, the duties of a high Government official should not be narrowly interpreted." 268 F. Supp. at 448-49. Applying this test, the court ultimately upheld the Admiral's claim of ownership only because the "speeches were handled as a private business from start to finish." 268 F. Supp. at 449.[9]

That the notes of Mr. Kissinger's telephone conversations must be considered official records under these decisions is beyond dispute. The notes were produced by government employees on government time and with government equipment; under Department policy, the monitoring of telephone conversations conducted by these employees was permissible only when essential for the conduct of official business. In addition, the express purpose for the creation of the notes was to assist an important government official in performing his official duties. Most importantly, the notes represent Henry Kissinger's conversations on official business — with foreign diplomats, other officials of the Executive Branch concerned with foreign policy, the President and fellow Cabinet members, and members of Congress — while conducting America's foreign policy for eight years. It is impossible to imagine conversations which more directly reflect the official business of the Nation.

[9]As the court emphasized, the speeches were written at the Admiral's home during his leisure time, he was not on duty or acting as a government representative when giving the speeches, they were delivered before private audiences, and the speeches themselves purported to reflect Admiral Rickover's personal views, not official government policy, and often covered topics unrelated to his government responsibilities. *Id.*

2. Throughout this litigation, Mr. Kissinger has insisted that, under State Department regulations, documents generated during a government employee's official duties will be treated as private property merely because he has filed them as "personal" when they were prepared. This extraordinary theory is directly contradicted by the very Department regulations on which Mr. Kissinger relies.

5 FAM § 432 provides as follows:

> "*Papers of a personal character which pertain only to an individual's private affairs* and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records at the office at all times." (Emphasis added).

Under this provision, Department employees may designate documents "personal" only if they are "papers of a personal character which pertain only to an individual's private affairs." If documents do not fit this description, personal designation is improper and, under 5 FAM §417.1(a), the documents may not be removed from Department custody when the employee resigns.[10]

Any other interpretation of 5 FAM § 417.1(a) would be in direct conflict with other Department regulations. For example, 5 FAM § 417.1(c) provides as follows:

> "Unclassified documents *relating to the performance of an employee's official duties* may be

[10]This provision requires as follows:

> "No papers kept in an employee's office that have not been explicitly designated or filed as personal at the time of origin or receipt may be removed from the Department or a post when the employee resigns, transfers to another Federal agency, or is otherwise separated from the Department or the Foreign Service, or at any other time, without the approval of the Director, Foreign Affairs Document and Reference Center."

> copied and privately retained by an employee if approved by the Director, Foreign Affairs Document and Reference Center." (Emphasis added).

If documents "relating to the performance of an employee's official duties" could be removed merely by designating them "personal," then this provision — which requires official authorization before *copies* of such records can be removed — would be meaningless. Similarly, under 5 FAM § 432, even when documents have been properly designated and filed as personal, retiring employees must extract and leave in Department files *all* portions of those documents that pertain to official business:

> "When official policy matters are discussed in personal correspondence, that portion *pertaining to functions or activities of the Department* or a post is to be extracted and made a part of the official records." (Emphasis added).

Under this extracting requirement, *any* portion of a document which concerns the affairs of the Department must remain in its files.

Even more overtly inconsistent with Mr. Kissinger's interpretation of Department regulations is 5 FAM § 417.2, which requires all departing Department officials to sign a form designated "JF-3."[11] This form requires the retiring employee to attest that he has "surrendered to responsible officials all unclassified documents and papers *relating to the official business of the Government* acquired by [him] while in the employ of the Department. . . ." (Emphasis added). The form also requires the departing official to confirm that he has not retained any "documents or material containing classified or administratively controlled information," including any "diaries, memorandums of conversations, or other documents of a personal nature."

[11]The copy of this form signed by Mr. Kissinger is Tab 2 to the Memorandum entitled "Donation Procedures," which is attached to the Second Affidavit of Henry A. Kissinger and was filed in support of Mr. Kissinger's motion for summary judgment in the District Court. This attachment does not accompany the version of the affidavit that appears in the Joint Appendix but is included in the complete record of proceedings in the District Court.

Finally, FAM § 423.2-1 specifically directs Department employees to create a full record of every telephone conversation "of any significance" and, thus, affirmatively categorizes the notes as official records. While Mr. Kissinger has argued that other materials in Department files contain a full record of his telephone conversations, he has never presented any evidence that, apart from the notes, he kept *any* systematic record of those conversations — much less the comprehensive record that 5 FAM §423.2-1 requires.[12]

[12]The only documents now in Department files that even arguably satisfy Section 423.2-1 are the extracts of the notes that were prepared by Lawrence Eagleburger, an aide to Mr. Kissinger, after their removal from Department custody. There are several reasons, however, why these extracts do not represent all of the official records which the Department was entitled to retain.

First, under 5 FAM § 432, extracting is only permissible in the first place for "papers of a personal character." Accordingly, if "extracts" were to be prepared, it was for Mr. Kissinger's personal files, not the Department's. More importantly, 5 FAM § 432 provides that, where appropriate, such extracting must encompass all materials "pertaining to the functions of all activities of the Department," while 5 FAM 423.2-1 requires the documentation of all conversations "of any significance." The extracts prepared by Mr. Eagleburger, however, clearly comprise but a small fraction of the official conversations in which Mr. Kissinger participated.

According to the affidavit of Mr. Monroe Leigh, the Department's Legal Adviser during Mr. Kissinger's service as Secretary of State, Mr. Eagleburger was instructed to extract only those portions of the notes which "contain any significant policy decisions or actions not otherwise reflected in the Department's records." Leigh Aff. ¶ 5 (JA 271). This standard would not include Mr. Kissinger's conversations with foreign and domestic officials in which no "policy decisions" were made or no

3. Although no Department regulation classifies the notes as personal records, Mr. Kissinger strenuously asserts that the Department "determined" that they had this status and that the lower courts erred in failing to defer to that "determination." This argument is unpersuasive for several reasons.

First, the Department's denials of respondents' FOIA requests merely assert, without any analysis or reasoning, that the notes are not official records. Moreover, both those denials and the Legal Adviser's opinions were issued weeks after the notes had already been removed, and, thus, must be discounted as the attempts of subordinate Department employees to provide a *post hoc* legal justification for decisions that the Department's head had already implemented.

If the Department had formally "determined" that the notes were Mr. Kissinger's personal property, one would expect the Department to defend its position in the courts. However, throughout this litigation, the Department has *never* suggested that Mr. Kissinger's construction of its regulations is correct. Indeed, the Department has studiously disassociated itself from Mr. Kissinger's position altogether. When an agency refuses to defend the "determinations" that a private party insists that it made, there is no reason why those determinations should receive any deference from a reviewing court.

Most importantly, while a "reasonable" interpretation of agency regulations may be entitled to deference, no agency

official "actions" were taken. Moreover, even if a conversation contained a "policy decision" or "action," it still would not be reflected in an extract if Mr. Eagleburger determined that it was not "significant." Finally, even if a conversation recorded a policy decision or action that was significant, an extract still might not have been prepared if it was determined — again in Mr. Eagleburger's subjective judgment — that the decision or action was "otherwise reflected in the Department's records."

has any authority to *violate* its regulations. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). This rule applies with special force when agency record-keeping determinations receive judicial scrutiny in suits under the FOIA. Paragraph (a)(4)(B) of the Act provides that, when agency records are withheld, the courts shall "determine the matter *de novo*." In view of this requirement, an agency's determination that documents generated by its employees are not "records" to which the FOIA applies should receive the closest examination from the courts and, when that determination deviates from the agency's own regulations, it should be totally disregarded.

4. Even if the notes were not Department records under its own regulations, they would have that status under the Federal Records Act, which establishes a comprehensive system of records management under the supervision of the General Services Administration. At 44 U.S.C. § 3301, the Act defines "records" of the United States to include:

> "[A]ll books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government . . . *in connection with the transaction of public business* and preserved or appropriate for preservation. . . as *evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government* or because of the informational value of data in them. . . ." (Emphasis added).

This definition of "records" is comprehensive. It clearly encompasses the notes, which were prepared "in connection with the transaction" of Mr. Kissinger's official duties and reflect the "policies, decisions, procedures, operations, or other activities" of the government while he was a public official.

Mr. Kissinger, however, argues that an agency is free under 44 U.S.C. § 3301 to reclassify a category of documents pertaining to official business as the "personal" property of individual agency employees, who may then remove such documents from agency custody without further authorization. This argument rests on a basic misconception of the procedure that Congress has chosen for determining how documents pertaining to official business will be discarded by the agencies that originate them.

44 U.S.C. § 3303 provides that, pursuant to regulations issued by GSA, each federal agency must compile and then submit to GSA schedules of all records that it believes are "not needed by it in the transaction of its current business and do not appear to have sufficient administrative, legal, research or other value to warrant their further preservation by government." Under 44 U.S.C. § 3303a, if the Administrator agrees that the records lack sufficient value to warrant their preservation, he may authorize the agency to dispose of them. However, when the Administrator has decided that records should be preserved, they will be stored in the facilities of the National Archives system, created by 44 U.S.C. §§ 2903, 2907, where they will remain available to the government and the general public.

These procedures for record disposition are plainly based on the premise that one agency, GSA, will have ultimate responsibility for determining which records have sufficient historical or other value to be preserved. In fact, 44 U.S.C. § 3314 expressly provides that "[t]he procedures prescribed by this chapter are exclusive, and records of the United States government may not be alienated or destroyed except under this chapter." GSA's government-wide authority over records disposition would be wholly subverted if, under the guise of redefining the term "records," individual agencies allowed employees to remove all files that they designated "personal." In this event, valuable and sensitive documents could be removed from government

custody simply because an individual official had the foresight to place them in a separate file, and agency record officers and GSA archivists would have no opportunity to determine whether retention of those documents would benefit either the government or the public at large.

For these reasons, the only construction of 44 U.S.C. § 3301 consistent with the effective operation of the Federal Records Act is to treat as "records" *all* documents created "in connection with the transaction of official business." Once materials fit this description, it should then be the function of agency record officers and GSA archivists to review the documents and determine whether they are "appropriate for preservation." Since the secretarial notes have never received this review, their removal from State Department custody was plainly unlawful.

5. There may be times when, for administrative reasons, it is desirable to exempt certain classes of documents from the definition of records in 44 U.S.C. § 3301, thereby permitting their disposal without agency or GSA review. However, the power to grant such exemptions resides solely with GSA, and GSA has not exercised that power here.

As amended, 44 U.S.C. § 2904 expressly authorizes the Administrator of GSA to "promulgate standards, procedures, and guidelines with respect to records management." Moreover, under 44 U.S.C. § 2905, the Administrator is required to "establish standards for the selective retention of records of continuing value." As the legislative history of the Act succinctly states, "[t]he heads of the federal agencies . . . would be *required* to observe standards and principles laid down by the Administrator of General Services within his authority." Cong. Rec. S.11253 (1950) (emphasis added).[13] Thus, GSA regulations

[13]GSA's power to prescribe uniform record-retention standards for all federal agencies is evident in other provisions of the Federal Records Act. 44 U.S.C. § 3105 requires each federal agency to establish

distinguishing between "official" and "personal" documents are binding throughout the federal government and will override contrary regulations that individual agencies may adopt.

GSA regulations provide that documents will fall outside the broad definition of records in 44 U.S.C. § 3301 only when they are "papers of a private or non-official character which pertain only to an individual's personal affairs" 41 C.F.R. § 101-11.202-2(d). Moreover, GSA has emphasized that the "definition of personal papers covers materials pertaining solely to an individual's private affairs." Accordingly, GSA has advised, "correspondence designated 'personal', 'confidential', or 'private', etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of federal law pertinent to the maintenance and disposal of such records." According to GSA, "official records are public records and belong to the office rather than the officer." GSA Bulletin FPMR-B-65, JA 167.

The standards for records maintenance prescribed by these regulations are no different from the standards contained in regulations of the Department of State. But were there any conflict, the Department's regulations would necessarily have to yield to the government-wide definition of "official records" promulgated by GSA — and, under this definition, the notes of Mr. Kissinger's telephone conversations plainly constitute records of the Department of State.

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safeguards against the removal or loss of records. Significantly, these safeguards must include all procedures "required by regulations of the Administrator of General Services." Similarly, 44 U.S.C. § 3102 requires each federal agency to establish an "active, continuing program for the economical and efficient management of the records of the agency." This program, too, must be in compliance with all regulations that the Administrator has issued. 44 U.S.C. § 3102(3).

B. Judge Smith Properly Exercised His Equitable Powers To Compel The Return Of The Notes To The Department Of State

Since the notes were unlawfully removed from the Department of State, they have never ceased to be Department "records" and, if they had remained in the Department's possession, they would still be subject to disclosure under the FOIA. Mr. Kissinger argues, however, that once the notes left the Department's physical custody, the FOIA ceased to apply. As the Court of Appeals determined, Mr. Kissinger lacks standing to raise this issue. Moreover, his position is in any event too insubstantial to warrant review by this Court.

1. When Mr. Kissinger "donated" the notes to the Library of Congress, he surrendered his claim of ownership to the United States. JA 61. Thus, the order of the District Court does not deprive Mr. Kissinger of his property; it merely requires documents owned by the United States to be transferred from one governmental body, the Library of Congress, to another, the Department of State, in order to facilitate review and processing under the FOIA.

Mr. Kissinger challenges that transfer on the ground that the Library of Congress is not an "agency" to which the FOIA applies and, hence, the notes are no longer subject to the District Court's remedial powers under the Act. This argument, however, relates not to Mr. Kissinger's interests as a private citizen, but to the interests of the governmental bodies who are required to comply with the order of the district court. These bodies did not appeal the district court's decision and, thus, acquiesced in Judge Smith's interpretation of their duties under the FOIA. It makes no sense to allow Mr. Kissinger to challenge that interpretation when the real parties in interest do not quarrel with it and have elected to perform the relief ordered by the lower court.

2. Even if Mr. Kissinger had standing to challenge the relief granted by the district court, the issue he seeks to raise would still be insubstantial.

Under the FOIA, federal agencies have an affirmative responsibility to produce all agency "records" requested by members of the public. 5 U.S.C. § 552(a)(3). The only records exempt from this responsibility are the nine narrow classes of documents specified in subsection (b) of the Act. To insure the fullest possible disclosure of agency records, subsection (c) emphasizes that the Act "does not authorize withholding of information or limit the availability of records to the public except as specifically stated" in these exemptions.

There is, of course, no provision of the Act which relieves an agency from disclosing documents which are agency "records" but happen to be outside the agency's physical custody. In the absence of a specific exemption for such documents, the broad disclosure duty mandated by subsection (c) should therefore apply. This conclusion is not undermined, as Mr. Kissinger suggests, by paragraph (a)(4)(B) of the Act, which authorizes the district courts "to order the production of any agency records improperly withheld from the complainant." Official records that the agency owns but declines to disclose can clearly be described as "improperly withheld" whether or not they happen to be stored on agency premises. Thus, a failure to retrieve and produce such records after they have been unlawfully removed from agency property should be treated no differently from any other violation of the Act.

Even more conclusive than the statutory language is the legislative history of the Freedom of Information Act. The FOIA was enacted for the explicit purpose of eliminating the discretion that agency officials possessed under prior law to suppress selected documents that were politically or personally sensitive. As the Senate Report explains the

rationale for subsection (c) of the Act: "[t]he purpose of the subsection is to make it clear beyond a doubt that *all materials* of the government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in Section 3." S. Rep. No. 1219, 88th Cong., 2d Sess., at 2 (1964) (emphasis in original). Mindful of these Congressional purposes, this Court has emphasized that the FOIA is "broadly conceived." According to the Court, Congress sought "to permit access to official information long shielded unnecessarily from public view and attempt[ed] to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973).

The broad disclosure responsibilities imposed by the Act could be easily evaded if the Act ceased to apply as soon as agency records left the physical custody of the agency. Agency employees could simply take home or store with friends documents that they considered politically sensitive or personally embarrassing. Similarly, such documents could be transferred to sister branches of the government, like the Library of Congress, to which the Act does not apply. Exactly as Mr. Kissinger has done here, stringent restrictions on access could then be imposed which shield important governmental activities from public view. Agency officials, unwilling to take action against offending employees or perhaps relieved that damaging information had been suppressed, could simply stand by idly without attempting to retrieve the documents that had been improperly removed from agency custody.

The lower courts have consistently recognized that the applicability of the FOIA turns not on whether documents are within the physical custody of an agency but, instead, on whether they are agency records and remain agency

property despite their location.[14] In *Ciba-Geigy Corp. v. Mathews*, 428 F. Supp. 523 (S.D.N.Y. 1977), for example, the court held "that the goals and purposes of the Act would be served best by imposing a standard which calls for proof that the records were either Government-owned *or* subject to substantial Government control or use." 428 F. Supp. at 529 (emphasis added). This test clearly presupposes that records *owned* by a government agency are covered by the Act even if they are not subject to the agency's physical control. Similarly, in *Tax Reform Research Group v. I.R.S.*, 419 F. Supp. 415, 419 (D.D.C. 1976), the court held that the fact "[t]hat the agency may no longer be in physical possession of the records . . . is not determinative . . . if the agency knows what records a given request is directed towards, knows where those records are located, and is able to produce them."[15]

[14]Mr. Kissinger relies on authorities which indicate that an agency has no duty to create records which do not exist or procure documents that it does not own in response to an FOIA request. *See* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 23-24 (1967); Nichols v. United States, 325 F. Supp. 130, 137 (D. Kan. 1971) *aff'd*, 460 F.2d, 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972); N.L.R.B. v. Sears Roebuck & Co., 421 U.S. 132 (1975).

These authorities are irrelevant. Respondents do not seek documents which do not now exist, or which have never been agency property, or which the agency has lawfully relinquished to a private party. Instead, they seek pre-existing documents which remain Department records in every respect but physical location and, but for their unlawful removal from agency custody, would plainly be subject to FOIA disclosure. In this situation, the agency retains an enforceable property interest in the documents and, in the terminology of the authorities cited by Mr. Kissinger, is in a position to exercise "control" over those documents even if they are outside its physical "custody."

[15]In this case, for example, the State Department could have retrieved the notes of Mr. Kissinger's telephone conversations from the Library of Congress by an informal request or, if the Library was uncooperative, the initiation of legal proceedings. In view of the Library's willingness to comply with the order of the district court, it is hard to believe it would have resisted an assertion of ownership by the Department. In the event that the Library failed to comply, however, the Department would have had an enforceable property interest which entitled it to possession of the notes by legal compulsion if necessary.

More recently, in *Forsham* v. *Califano*, ____ F.2d ____, No. 76-1308 (July 11, 1978), the Court of Appeals for the District of Columbia Circuit held that documents which are outside an agency's physical custody will nevertheless be subject to the FOIA when there is "significant government control of day-by-day operation, or detailed involvement in the planning or execution" of the activities to which those documents relate. Slip Op., 21. While the court concluded that this test had not been met in the case before it, it stressed that the mere physical location of documents cannot determine whether the FOIA applies:

> "We do not suggest that mere physical possession of records by a government agency is the sole criterion for determining whether they fall within the scope of FOIA. Obviously, a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee." Slip Op., 16 n.20.

3. Applied here, these principles compel the conclusion that the notes of Mr. Kissinger's conversations are still subject to the FOIA if they remain State Department records in every respect except physical location. It is no bar to relief that the notes first must be returned to the agency that owns them before they can be processed for public disclosure under the Act. This Court has clearly established that a court enforcing the FOIA may invoke all of its equitable powers to enforce the public's rights to disclosure under the FOIA.

In *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), three defense contractors engaged in renegotiation proceedings unsuccessfully sought disclosure

of certain documents from the Renegotiation Board. Relying on the Freedom of Information Act, they sued to enjoin renegotiation proceedings before the Board until the documents were produced. The Board argued that, under the FOIA, the only relief that a court could grant was to order the disclosure of withheld documents. This Court disagreed. It held that, in order to protect rights secured under the FOIA, the district courts may exercise their "inherent capacity to provide appropriate equitable relief."[16] 415 U.S. at 16-20.

If it is permissible to enjoin administrative proceedings to protect rights secured by the FOIA, then the District Court was certainly empowered to direct the Department of State to repossess documents that the Department lawfully owns and, but for their physical location, would clearly be subject to FOIA disclosure. If no such remedy were available, FOIA litigants would be forced to watch helplessly while government officials evaded public scrutiny by removing agency records from government property or transferring them to branches of the government to which the Act does not apply. Such a situation would plainly be incompatible with the objectives of the FOIA.

C. The Processing and Disclosure of the Notes Pursuant To The FOIA Will Not Violate Mr. Kissinger's Privacy Rights Under The Constitution

Mr. Kissinger also attacks the district court's decision on the ground that it unconstitutionally invades his privacy rights by requiring State Department records officers to obtain and review notes of conversations that concern personal matters. This argument, too, is insubstantial.

[16] It is widely recognized that *Bannercraft* provides authority for enjoining agency proceedings in the absence of compliance with the FOIA. *See, e.g.*, Goodfriend Western Corp. v. Fuchs, 411 F. Supp. 454 (D. Mass. 1976); United Telephone Company of Pennsylvania v. F.C.C., 375 F. Supp. 992 (M.D. Pa. 1974); Capital Cities Communications, Inc. v. N.L.R.B., 409 F. Supp. 971 (N.D. Cal. 1976).

As a record of Mr. Kissinger's telephone conversations during each working day, the notes relate predominantly to official business. Mr. Kissinger was an important government official with numerous responsibilities, and he undoubtedly devoted little official time to arranging his social life, communicating with his family or managing his finances. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), this Court made it clear that "the public has a recognized interest" in documents which concern official business and such documents are not protected by any right of privacy. 433 U.S. at 459, 462.

As Mr. Kissinger points out, the District Court required the return of *all* the notes to the Department so Department records officers could separate those few notes that are purely personal from the vast majority that are official in nature.[17] However, *Nixon* conclusively establishes the legality of this procedure, too, in holding that GSA could take possession of the complete materials of Mr. Nixon's Presidency in order to separate personal from official documents:

> "Thus, the Act 'is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-

[17] Mr. Kissinger objects to the District Court's Order on the ground that it requires the Department to repossess portions of the notes that relate to purely personal matters and makes no provision for the return of these materials to him. Petition, 26-27. At no time in this litigation, however, has Mr. Kissinger asked for this relief. Respondents have never sought disclosure of transcripts of purely personal conversations and would not object to a procedure which provides for the return of these transcripts to Mr. Kissinger after their review by State Department records officers.

> private documents and materials related to government objectives. The processing contemplated by the Act — at least as narrowed by carefully tailored regulations — represents the least intrusive manner in which to protect an adequate level of promotion of government interests of overriding importance.' *Id.*, at 367. We agree with the District Court that the Act does not unconstitutionally invade appellant's right of privacy." 433 U.S. at 456-57.

In this case, only review of the complete notes by Department records officers can assure that those portions which reflect official business are returned to the Department in their entirety.[18] Moreover, the archival screening of the notes required under the District Court's Order will safeguard Mr. Kissinger's privacy to the maximum extent possible. Before any portion of the notes can be disclosed to the public, they must be reviewed by Mr. Kissinger himself, who will then have an opportunity to enjoin their release under Exemption 6 of the FOIA, which forbids "clearly unwarranted invasions of personal privacy." Pet. App. 60a-61a. Thus, there is every reason to believe that the few portions of the notes that are purely personal will never be publicized outside of the narrow circle of State Department

[18] A similar procedure was also upheld by this Court in Department of Air Force v. Rose, 425 U.S. 352 (1976). That case involved an FOIA request for certain case summaries of honor and ethics hearings concerning cadets at the Air Force Academy. The Court agreed with the Air Force that "the disclosure of the summaries implicates . . . privacy values." 425 U.S. at 376. It therefore directed the district court to edit the case summaries to delete personal information — recognizing that this information would necessarily be disclosed to the district judge. To the objection that this disclosure would itself constitute an invasion of privacy, the Court responded that "the in camera procedure [ordered] will further the statutory goal of . . . a workable compromise between individual rights 'and the preservation of public rights to Government information.'" 425 U.S. at 381.

officials charged with reviewing them. Clearly, the resulting intrusion on Mr. Kissinger's privacy will be minimal and can easily pass muster under the Constitution.

CONCLUSION

Mr. Kissinger's petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1088

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

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HENRY A. KISSINGER,

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v.

MILITARY AUDIT PROJECT, *et al.*,

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BRIEF OF RESPONDENT MILITARY AUDIT PROJECT, *et al.*, IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Petitioner as Secretary of State conducted a great deal of the Department's, and the nation's, business by

telephone. App. 56a, 71a, 74a. He caused these conversations to be reduced to a written record. App. 52a. After an early Freedom of Information request for some of the papers had been denied by the Department of State, App. 66a, petitioner on October 29, 1976, shipped the records to the private home of then Vice President Rockefeller in New York. App. 52a. In mid-December petitioner decided to "donate" the records to the Library of Congress. App. 77a. On December 24, 1976, petitioner executed a deed of gift to the Library, with a restriction preventing access by anyone but himself for 25 years. J.A. 57, 60, 61. On December 28 the records were shipped from the Rockefeller home to the Library. App. 53a. That same day respondent Military Audit Project (MAP) filed a Freedom of Information Act (FOIA) request for records of conversations with foreign government heads. J.A. 82. The Department of State denied the request on January 18, 1977, while petitioner was still Secretary of State and therefore still legal custodian of the records of that agency. J.A. 85. The denial claimed that those records that had been transferred to the Library were not "agency records." *Id.*[1]

The Department of State's and the Librarian of Congress' answer to MAP's complaint denied that the records sought were agency records. J.A. 28, 184. MAP moved for summary judgment. The government defendants' reply to the motion was a demand on petitioner to give the Department of State access to inspect the records in order to determine whether they were agency records

[1] As to the rest, the request was denied as too "broad." The Department of State subsequently agreed to withdraw its objection and to process the rest of the records under the FOIA. There is no issue remaining in this case except as to the records petitioner removed from the Department.

that the Department ought to reclaim. J.A. 190-202. Such access was afforded. J.A. 274-79. The Department never announced any result of its inspection, but the government defendants did not further oppose respondents' motions for summary judgment, did not appeal the district court's judgment and have ceased to assert that the records are not agency records.[2]

The district court held that the documents were agency records and ordered them returned to the Department of State for FOIA review and release. The opinion was followed by an order granting petitioner the unusual privilege of restraining, by application to that court on privacy grounds, the release of any documents under the FOIA. App. 60a-61a. The court of appeals affirmed the district court with a brief *per curiam* memorandum. App. 47a-50a.

ARGUMENT

None of petitioner's three issues is of substance deserving review by this court, as the court of appeals' prompt and summary affirmance of the district court confirms. Obviously a district court has the power and the duty to decide if records are agency records when that issue is raised in an FOIA suit. (Pet. 17-23) Obviously the All Writs Act gives a district court the power to order agency records returned to the agency in order that the court's jurisdiction, conferred by the FOIA, be preserved and its judgment given effect. (Pet. 13-17) And equally obviously, as this Court has held, agency screening of documents before release to the public, to preserve

[2] *See* Brief for the United States as Amicus Curiae, No. 78-1208 (D.C. Cir.) at 11-12 and *passim*.

privacy interests, is within agency power and does not violate a constitutional privacy right. (Pet. 24-27)

The "Agency Records" Issue

1. In a remarkably adroit avoidance of the plain words of the FOIA, petitioner argues that the courts below were bound to accept, without review, an agency assertion that documents sought under the FOIA were not "agency records." District court jurisdiction under the FOIA extends only to "agency records." 5 U.S.C. § 552(a)(4)(B). If an agency, in defending an FOIA action, asserts that the records sought are not "agency records," nothing could be clearer than the district court's duty, and power, to decide that question.

2. No live "agency records" issue was left in this case by the time it reached the court of appeals, and hence no live "agency records" issue is before this Court now. The government defendants have abandoned their assertion that the records were not agency records and have not appealed the district court's judgment (p. 8, *supra*). The "agency" thus accepts the determination that the records are "agency records." Petitioner, having given away the documents to the Library and having failed to cross claim against the Library to restrain transfer to the Department of State (as the complaints had prayed) is without standing to oppose the government's willing compliance with the district court's order.

3. Petitioner places great reliance on the asserted regularity of the Department of State's determination that the documents were petitioner's private property, as embodied in the Department of State Legal Adviser's Memorandum of November 11, 1976. (Pet. 20, 22) Petitioner hopes that the Court will forget that two weeks before he thought to obtain the Legal Adviser's

written opinion, petitioner had shipped the documents off to the private home of then Vice President Rockefeller. App. 52a. Resort to the Legal Adviser seems to have been an afterthought about what kind of paper record had to be created to cover the documents' departure from the Department; as petitioner's "gift" to the Library seems to have been afterthought about where the documents might lawfully be stored.

Petitioner also seems to hope that the Court will forget that at all times pertinent, i.e., when the Department of State's supposedly "regular" determination was made; when the documents were shipped to the Rockefeller home; when they were re-shipped to the Library of Congress; when respondents' FOIA requests were made, and when respondents' FOIA requests were denied, petitioner was Secretary of State and himself head of the Department. Determinations made by petitioner's subordinates awarding immensely valuable documents to petitioner and then denying that the public had any FOIA right of access to the documents may not be quite so "regular" after all. The change of mind at the Department, now that petitioner is no longer its master, in accepting the district court's order to recapture the documents and process them under the FOIA, is not irrelevant.

4. Petitioner's artful congeries of regulations, common law cases and denigration of the quality of the documents (*see*, e.g., Pet. 20) skips over the heart of the district court's holding on the merits of the "agency records" issue—that the content of the documents, recording important government business, was dispositive. App. 55a-56a (footnotes omitted):

> Dr. Kissinger's final argument, based on the proposition that creation of the extracts fully

satisfied the State Department's record-keeping requirements, is that the notes are personal working papers, not "agency records" and not subject to an FOIA request. . . .

State Department regulations require documentation of all official activities in order to "facilitate the making of decisions and policies and the taking of actions" by Department employees and "to provide materials for research and historical purposes." 5 Foreign Affairs Manual [FAM] § 423.1. *See* 41 C.F.R. § 101-11.202-2(a). This requirement extends to all "decisions, commitments, and discussions of any significance which are oral in nature." 5 FAM § 423.2-1. *See* 41 C.F.R. § 101-11.202.2(b). Involved here are high-level conversations of the Secretary of State. The significance of the commitments, decisions, and discussions embodied in these conversations is apparent from the stature of the other parties to them (two presidents, heads of state, cabinet officers, diplomats, legislators, scholars, journalists, and others) and is underscored by a Department policy which prohibits monitoring of telephone conversations except when "absolutely essential to the conduct of business." Consequently, under his own regulations, Dr. Kissinger had no alternative but to document the matters discussed in the conversations.

The *Bannercraft* Issue

1. The Library's and Department's failure to appeal robs petitioner's *Bannercraft* issue of viability as it does his "agency records" issue. The district court relied on inherent equity power to order the Library to ship the documents to the Department and to order the Department to process them under the FOIA. Both the Library

and the Department are ready, willing and able to comply; indeed, only this Court's earlier stay restrains them from immediate compliance. With the parties directly affected willing to accept the district court's exercise of equity power, petitioner's challenge waves weakly in the air.

2. In any event the lower courts did no more than follow this Court's direction in *Bannercraft* and Congress' direction in the FOIA.

a. The FOIA expressly empowers district courts "[o]n complaint . . . to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).[3] There is no limitation in the statute on who may be named a defendant in such a complaint or who may be made subject to such an order.[4]

b. In *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 17-20 (1974), this Court held that the FOIA's express grant of power "to enjoin the agency from withholding agency records," 5 U.S.C. § 552(a)(4)(B), did not "limit the inherent powers of an equity court," 415 U.S. at 20. The Court held that many of its earlier decisions recognized "broad equity power," "sometimes related to the All Writs Act, 28 U.S.C. § 1651(a)." 415 U.S. at 18-19. In other words, in order to prevent a defeat of its jurisdiction, conferred by

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[3] Section 552(a)(4)(B) also provides for court inspection of records in camera to decide contested claims of exemption. A court must have power to order the production of such records from whomever may have them in order to carry out that responsibility.

[4] Unlike the preceding phrase, which confers power to enjoin an "agency" from withholding.

Congress, to enforce the FOIA, a district court may exercise powers traditionally exercised by courts of equity by way of injunction, mandamus and the other chancery writs incorporated in the All Writs Act. There is hardly anything novel in an injunction issued to the Library of Congress against continuing to hold agency records of the Department of State and ordering their return to the Department of State in order that the Department may comply with the requirements of the FOIA.

The Privacy Issue

Petitioner's privacy issue boils down to an objection to screening of the documents by State Department personnel. That screening will separate petitioner's private and personal material from material disclosable under the FOIA. The district court's order expressly preserved petitioner's power to prevent release of personal material. App. 60a-61a.

Government authority to screen documents to prevent disclosure of private matter, while releasing what must be released under the FOIA, has been expressly approved by this Court. *Department of the Air Force v. Rose*, 425 U.S. 352, 381 (1976). Such screening was expressly approved under the FOIA analogue, the Presidential Materials Act, in *Nixon v. Administrator of General Services*, 433 U.S. 425, 455, 459, 462-65 (1976).

Petitioner lamely attempts to distinguish *Nixon* as applying only to former President Nixon as "a legitimate class of one," argued to be unique among government officials. The phrase appears only in the Court's discussion of the Bill of Attainder issue in *Nixon*, and that is its only application. Petitioner obviously does not assert that the FOIA is a bill of attainder as applied to him.

CONCLUSION

The issues petitioner raises are largely manufactured of whole cloth. The petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1978

No. 78-1088

HENRY A. KISSINGER,
Petitioner,
v.
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.,
Respondents.

HENRY A. KISSINGER,
Petitioner,
v.
MILITARY AUDIT PROJECT, et al.,
Respondents.

REPLY BRIEF OF PETITIONER HENRY A. KISSINGER

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April 9, 1979

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

IN THE

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This Reply Brief responds to the briefs in opposition to Dr. Kissinger's Petition for a Writ of Certiorari in No. 78-1088 filed by the Reporters Committee for Freedom of the Press, et al. (the "RCFP respondents") and by the Military Audit Project, et al. (the "MAP respondents").[1] It also

[1]The RCFP and MAP respondents are collectively referred to as the "private respondents." Their opposition briefs are referred to, respectively, as "RCFP Opp." and "MAP Opp." The RCFP respondents have also filed a cross-petition for certiorari in No. 78-1217 ("RCFP Pet."). Dr. Kissinger's brief in opposition to the cross-petition ("Kissinger Opp.") was filed on March 7, 1979.

responds to the briefs filed by the federal respondents in Nos. 78-1088 and 78-1217 ("Fed. Resp. Kissinger Br.") and in *Forsham v. Califano* (No. 78-1118) ("Fed. Resp. Forsham Br.").

We agree with the federal respondents' conclusion that the central issue in all three petitions is whether the Freedom of Information Act ("FOIA") applies to documents not in the custody or control of an agency when a FOIA request is made with respect to them.[2] We also agree that this issue poses an important question concerning the scope of a frequently-litigated federal statute, that the issue is likely to recur, and that it is unlikely to be resolved without a definitive ruling by this Court.[3] We do not, however, accept the federal respondents' suggestion that the remaining issues presented by Dr. Kissinger's Petition are not sufficiently important to merit review by this Court. Although a decision that FOIA has no

[2]*Kissinger* involves two different categories of documents. The first (at issue in No. 78-1088) consists of rough notes made of Dr. Kissinger's telephone conversations when he was Secretary of State; the second (at issue in No. 78-1217) consists of similar notes made when Dr. Kissinger was Assistant to the President. Although the State Department period notes were produced on State Department premises, the agency never legally possessed them at any time because the Department's rules give it no right to inspect papers that are maintained (as were these) in an employee's personal files. Kissinger Pet. at 24 n.22. The same is true of the White House period notes, which were produced outside an "agency" and were only stored there in Dr. Kissinger's private files while he was Secretary of State. Kissinger Opp. at 6-7. That the State Department never had legal possession or custody of any of the notes is an additional reason why none of them can be its "records."

[3]The private respondents have suggested that this issue has no importance because the federal respondents "do not quarrel with" the district court's order. RCFP Opp. at 19; *see also* MAP Opp. at 6-7. It is now apparent that the federal respondents *do* quarrel with the portion of the district court's order that is adverse to Dr. Kissinger. Their willingness to present the Government's views on the issue should certiorari be granted effectively disposes of the notion that the Government's interests will not be affected if the decision below is allowed to stand.

application to documents not in the custody or control of an agency would make it unnecessary to decide these questions, we submit that they are too important to be ignored if the Court concludes that the relief granted in No. 78-1088 — but denied in No. 78-1217 and in *Forsham*[4] — should have been afforded in all three cases.

1. The private respondents argue that the notes are "agency records" because the Government, as Dr. Kissinger's employer, "owns" all documents that he produced within the scope of his employment.[5] The federal respondents plainly do not accept the notion that common law property concepts can supplant the standards established by the Federal Records Act. They nonetheless suggest that "at least some" of the State Department period notes are federal records within the meaning of 44 U.S.C. §3301, because "the notes include many conversations relating directly to the transaction of public business." Fed. Resp. Kissinger Br. at 10.[6] This is a curious

[4]The Court of Appeals held in *Kissinger* that notes made of Dr. Kissinger's conversations when he was Secretary of State could be ordered returned to the State Department for FOIA processing despite the fact that these documents were not then, and never had been, in the agency's custody or control. A different panel of the same court held in *Forsham* that documents which an agency did not choose to possess were not "agency records" subject to FOIA disclosure. It is, of course, impossible to reconcile the result in No. 78-1088 with the decision in *Forsham*. Although the "possession" issue is also present in No. 78-1217, we believe certiorari need not be granted for that case because the factual record necessary to permit meaningful review of the questions it presents was not properly developed below. *See* Kissinger Opp. at 5-9.

[5]A similar argument is made by the petitioners in *Forsham*. Forsham Pet. at 15-18.

[6]The federal respondents also state that "the notes were preserved in part to provide a record of the functions, policies, and decisions of the government." *Id.* We do not understand this statement. It is clear that the *State Department* did not "preserve" the notes as evidence of its "functions, policies, and decisions." The records of Dr. Kissinger's oral commitments, decisions and significant discussions which the

conclusion in view of their statement, made elsewhere in the same brief, that the notes from the White House period would not be National Security Council records simply because they "'relate to the affairs of the NSC.'" *Id.* at 8 n.5.

The reality is that the question whether any particular document is an "agency record" cannot be resolved by a casual reference to the language of 44 U.S.C. §3301. Although the statutory definition of "records" is broad, the legislative history makes clear that agencies "are not obliged to consider every scrap of paper on which writing or printing appears as a record."[7] Nor do agencies treat all documents that their employees create as "records."

An exhaustive study of this question conducted by the National Study Commission on Records and Documents of Federal Officials confirms the existence of large quantities of written materials that routinely are *not* filed as agency records even though these materials are generated by government employees, used by them in the performance of their duties, and plainly relate to the transaction of public business.[8] Such "non-record materials" are not filed as official records because they do not constitute "required documentation" of the agency's functions, policies and decisions. Indeed, guidelines issued by the General Services

Department preserved were the finished memoranda of conversations and copies of correspondence that Dr. Kissinger's staff created and filed as official records. Kissinger Pet. at 6 n.4. Dr. Kissinger's affidavit makes clear that he regarded the notes as "work aids which I could retain or discard as I chose." Pet. App. 74a. That *Dr. Kissinger* preserved the notes is fortuitous and can have no legal significance.

[7]H.R. Rep. No. 559, 78th Cong., 1st Sess., *reprinted in* [1943] U.S. Code Cong. Serv. 2140. *See generally*, Kissinger Pet. at 18-19.

[8]*See generally*, National Study Commission, Final Report (1977); Memorandum of Findings on Existing Custom or Law, Fact and Opinion (1977). Although Dr. Kissinger cited these reports in his Petition, neither the private respondents nor the federal respondents have referred to them.

Administration for the use of federal agencies in implementing the Federal Records Act expressly state that "non-record materials . . . shall not be incorporated in the official files of the agency." 41 C.F.R. §101-11.401-3(d).[9]

State Department regulations issued pursuant to those guidelines explicitly provide that "working papers, such as preliminary notes, do not constitute required documentation . . . ." 5 FAM §423.2-8.[10] Dr. Kissinger contends that the notes of his telephone conversations were properly classified as "non-record materials" under this and related agency regulations.[11] That contention was not even addressed below.

[9]The General Services Administration has authority to issue the guidelines, 44 U.S.C. §2904, to inspect agency records "for the purpose of rendering recommendations for the improvement of records management," 44 U.S.C. §§2906(a)(1), and to supervise the disposal of agency records. 44 U.S.C. §3302, 3314. It does not, however, have authority to determine whether a particular document should be filed and preserved as a "record" of an agency; that authority is vested exclusively in the agency. 44 U.S.C. §3101. The private respondents' suggestion that the notes should have been inspected by GSA archivists before they were donated to the Library of Congress is wholly without foundation; GSA has no authority to inspect or otherwise control the disposition of non-record materials.

[10]The private respondents ignore this regulation in their discussion of the "records" issue.

[11]The RCFP respondents assert that Dr. Kissinger's position rests on the argument that

> under State Department regulations, documents generated during [*sic* — in performance of?] a government employee's official duties will be treated as private property merely because he has filed them as 'personal' when they were prepared. RCFP Opp. at 11.

Dr. Kissinger does not contend that the notes are not records *because* he filed them as "personal," but rather that the notes were filed as personal because they were "non-record materials" which had no place in the official files. If such materials are not to be filed as official records, they may be discarded or kept as the employee chooses. If the employee chooses to keep the materials, his personal files are the

The proper definition of "agency records" for purposes of FOIA has caused considerable confusion in the lower courts.[12] That confusion will continue to complicate administration of the Act unless this Court provides guidance as to how the "agency records" language of FOIA is to be related to the provisions of the Federal Records Act.[13] This issue need not be reached if the Court concludes that the private respondents failed to state a claim under FOIA because their requests were made after the notes were transferred to the Library of Congress. However, the issue is significant, both for Dr. Kissinger and for FOIA litigants generally, and we submit that the Court should include it among the issues accepted for review.

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logical place in which to store them. The RCFP respondents could not have objected if Dr. Kissinger had discarded the notes. We fail to understand why his election to retain them in his personal files improves their case.

[12] *See, e.g., Forsham v. Califano*, 587 F.2d 1128 (D.C. Cir. 1978), *cert. pending*, No. 78-1118; *DiViaio v. Kelley*, 571 F.2d 538 (10th Cir. 1978); *Goland v. CIA*, No. 76-1800 (D.C. Cir., May 23, 1978); *Nixon v. Sampson*, 389 F.Supp. 107 (D.D.C.), *stayed sub nom. Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975), *dismissed as moot*, 437 F.Supp. 654 (D.D.C. 1977), *rev'd and remanded*, No. 77-2123 (D.C. Cir., Dec. 21, 1978); *Nichols v. United States*, 325 F.Supp. 130 (D.Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972); *Save the Dolphins v. Department of Commerce*, 404 F.Supp. 407 (N.D. Cal. 1975); *Porter County Chapter of the Izaak Walton League v. AEC*, 380 F.Supp. 630 (N.D.Ind. 1974). We note, in view of the private respondents' heavy reliance on *Nixon v. Sampson*, that the reported opinion is unsupported by an order and thus has been held by the Court of Appeals to be "without influence as a precedent." *Brandon v. Eckard*, 569 F.2d 683, 686 n.15 (D.C. Cir. 1977).

[13] Also important to resolution of this issue is the further question of the relationship between FOIA's *de novo* review standards and the general review standards established by the Administrative Procedure Act. *See generally*, Kissinger Pet. at 17-18, 22-23. This significant question is currently under review by this Court in a related context. *Chrysler Corp. v. Brown*, No. 77-992.

2. The federal respondents assert that Dr. Kissinger's privacy argument is "premature" because

> even if the district court's order is sustained, Kissinger will have a further opportunity to raise his constitutional objections to the release of any materials in which he has a significant privacy interest, if the Department decides to release any such materials at the conclusion of its review of the notes. Fed. Resp. Kissinger Br. at 11.[14]

This mischaracterizes the nature of Dr. Kissinger's privacy claims.

The bland suggestion that Dr. Kissinger's privacy argument is "premature" ignores the unprecedented and extraordinary violation of privacy rights called for by the order. The notes contain far more than details about Dr. Kissinger's private life. They also reflect privately-held political views, statements affecting the reputations of third parties, thoughts, opinions and beliefs on a variety of subjects, and information relating to Dr. Kissinger's associations with individuals and organizations. The notes were made and kept in the reasonable expectation that they were non-record materials which would not be part of any official file. The vice of the order is that it retroactively reclassifies the notes as "records" and requires that *all* of them, regardless of content, be read by Executive Branch employees to determine their FOIA status. According Dr. Kissinger an opportunity to object to public release of

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[14] The district court's order affords Dr. Kissinger "reverse FOIA" rights to object to release of any materials "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" within the meaning of 5 U.S.C. §552(b)(6). Pet. App. 60a-61a. Whether FOIA submitters are entitled to assert "reverse FOIA" claims is currently under review in *Chrysler Corp. v. Brown*, No. 77-992. There is, of course, no assurance that the district court's order would not be amended if this Court concludes in *Brown* that "reverse FOIA" claims are not authorized by FOIA.

materials otherwise exempt from disclosure under 5 U.S.C. §552(b)(6) does nothing to eliminate the egregious violation of constitutionally protected privacy rights which the inspection process requires.

Nixon v. Administrator of General Services, 433 U.S. 424 (1977), in no way supports the constitutionality of the inspection order. The far more elaborate[15] procedures at issue in *Nixon* were prescribed by a special statute enacted as an emergency measure to preserve the former President's papers from the imminent threat of destruction. There is no warrant whatever for the assumption that this Court's carefully qualified decision sustaining that legislation authorizes district courts to use a watered down version of the *Nixon* procedures as a substitute for the usual rules applicable to claims of privilege in civil cases.[16]

The mischievous notion that *Nixon* provides a model for future litigation involving constitutional privacy claims is itself sufficient reason to grant Dr. Kissinger's Petition. Although this issue need not be reached if the Court decides the first question as Dr. Kissinger and the federal respondents believe it should be decided, the constitutional issue cannot, in justice, be avoided if the Court carries its analysis beyond that threshold question.

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[15] *Compare* Pet. App. 59a-61a, *with* 44 U.S.C. §2107 *note*. §§102-105. *See also* 41 C.F.R. §§105-63.101-63.303 (procedures for processing the Nixon materials); 42 F.R. 63626-63629 (Dec. 16, 1977) (proposed public access rules).

[16] The private respondents' reliance on *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), as justification for Executive Branch inspection of the notes is plainly misplaced. *Rose* actually confirms the general principle, ignored below, that *in camera* review by an impartial judicial officer — not Executive Branch employees — is required when constitutional privacy rights are at stake. That review must take place *before* the privacy invasion, not afterwards.

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant certiorari as to all questions presented in No. 78-1088.

Respectfully submitted,

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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OPINIONS BELOW

The *per curiam* judgment of the Court of Appeals and an accompanying memorandum (Pet. App. [1] 47a-50a) are not reported. The opinion of the District Court (Pet. App. 51a-58a) is reported at 442 F. Supp. 383; not reported are its orders of January 25, 1978 (Pet. App. 59a-61a), and March 2, 1978 (Pet. App. 63a-64a).

[1] "Pet. App." denotes the Appendix to the Petition for a Writ of Certiorari filed in No. 78-1088.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1978. The petitions for writs of certiorari were filed in No. 78-1088 on January 8, 1979, and in No. 78-1217 on February 5, 1979. The petitions were granted, and the cases were ordered consolidated, on April 16, 1979. The jurisdiction of this Court is based upon 28 U.S.C. §1254(1).[2]

QUESTIONS PRESENTED

1. Does the Freedom of Information Act apply to written materials which are not, and never were, in the custody or control of an agency? (Nos. 78-1088 and 78-1217).

2. Are rough notes made of petitioner Kissinger's telephone conversations when he was Secretary of State, which were never incorporated in the official files of the Department of State or claimed by it as its records, "agency records" subject to disclosure under the Freedom of Information Act? (No. 78-1088).

3. Is it constitutionally permissible to authorize Executive Branch employees to possess, read and retain the

[2]Dr. Kissinger is the petitioner in No. 78-1088. The respondents in that case are (a) the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenburg, Arthur Link, and William Safire (the "RCFP requesters"); (b) the Military Audit Project and Felice D. Cohen (the "MAP requesters"); and (c) the Department of State, its Secretary, Cyrus R. Vance, the Librarian of Congress, Daniel J. Boorstin, and the Archivist of the United States, James B. Rhoads (the "federal respondents"). The RCFP requesters are cross-petitioners in No. 78-1217; all other parties are respondents in that case. The RCFP and MAP requesters are sometimes referred to collectively as the "requesters" or the "private respondents"; the RCFP requesters are also referred to as "cross-petitioners" in discussion of the issues presented by No. 78-1217.

notes of petitioner Kissinger's telephone conversations, when these notes were made in the legitimate expectation that they would not be treated as official records and when they reflect thoughts, opinions, beliefs and personal details which have no place in official records? (No. 78-1088 and, by implication, No. 78-1217).

4. Are rough notes made of respondent Kissinger's telephone conversations when he was Assistant to the President for National Security Affairs, which were never incorporated in the official files of any agency or claimed by any agency as its records, "agency records" subject to disclosure under the Freedom of Information Act? (No. 78-1217).

STATUTES AND REGULATIONS

The relevant portions of the Freedom of Information Act ("FOIA"), 5 U.S.C.§552 (Pet. App. 1a-10a); the Privacy Act, 5 U.S.C. §552a (Pet. App. 11a-16a); the Federal Records Act ("FRA") and related laws, 44 U.S.C. Chapters 21, 29, 31 and 33 (Pet. App. 17a-28a); the Federal Property Management Regulations, 41 C.F.R. Part 101-11 (Pet. App. 29a-34a); and the Foreign Affairs Manual of the Department of State, 5 FAM Part 400 (Pet. App. 35a-46a); are reproduced in the Appendix filed with the Petition in No. 78-1088.

STATEMENT OF THE CASE

A. Facts[3]

The Telephone Notes

The typed materials at issue in this case came into being as the result of monitoring, a common practice in which a

[3]Most of the facts appear in an uncontroverted affidavit which Dr. Kissinger filed in the District Court. A. 244a. The remaining facts appear in various public documents which were introduced as exhibits to the pleadings.

third party listens to and takes notes of a government official's telephone conversations. This procedure has been used for decades by senior government officials to assist in the internal management of their offices. The notes serve as a rough log or daily diary to which the official and his immediate staff can refer in carrying out the ongoing work of the office. This work includes the production of correspondence, memoranda and other formal documents which are filed as official records of the agency. The notes are not filed, because they are preliminary working papers that have no official significance after the records are created.[4]

These procedures were followed in Dr. Kissinger's case. During his years in government,[5] a secretary generally listened to and took notes of Dr. Kissinger's telephone conversations. This was done as a matter of internal routine to ease the administrative burdens of the office. Dr. Kissinger's Executive Secretary checked the notes periodically to make up his appointments calendar; his Senior Special Assistant read them to keep abreast of his activities in order to know whether any matters discussed by telephone required follow-up or implementation. The notes had no other purpose. A.244a-45a. They were not intended to be, or treated as, official records of Dr. Kissinger's oral commitments and decisions; the official records were the formal documents that were produced, circulated and filed in the ordinary course of business as part

[4]Notes, drafts, preliminary worksheets and similar papers fall within a general class of informal documents known as "non-record materials." *See* pp. 33-39, *infra*. Such materials need not and, indeed, must not be filed as records. 41 C.F.R. §101-11.401-3(d).

[5]Dr. Kissinger served at the White House as Assistant to the President for National Security Affairs from January 20, 1968, until November 3, 1975. He became Secretary of State on September 22, 1973, and continued in that position until January 20, 1977. A. 244a.

of the follow-up process.[6]

When Dr. Kissinger was at the White House, the notes of his telephone conversations were kept in his office with his other personal papers in separate files marked "personal." A. 247a. When he became Secretary of State, these personal files were physically removed to his new office for storage. As at the White House, these notes and the additional notes subsequently generated in the State Department office were kept in separate personal files. They were never circulated outside Dr. Kissinger's office, never intermingled with the State Department's official records, and never seen by anyone other than Dr. Kissinger's immediate aides. A. 245a-46a. This treatment was consistent with Dr. Kissinger's understanding that the notes were "work aids which I could retain or discard as I chose as had several of my predecessors and many other officials." A. 245a.

Because the notes were not designed to serve as official records, no effort was made to restrict monitoring to purely business calls. The notes therefore reflect official and non-official and private conversations.[7] Nor were the notes edited

[6]The official records of Dr. Kissinger's oral transactions are voluminous. One of the FOIA requests filed in this case asked for all "memoranda, aide memoirs, memoranda of conversations . . . or other written" records of conversations "conducted by Mr. Kissinger in his capacity as Secretary of State . . . ." A. 71a. The Department denied this request as overly broad, stating that it

> apparently includes aide memoires, diplomatic notes, memoranda of meetings, memoranda of telephone conversations, and correspondence between the former Secretary and persons both within and without the Department of State — a very large and undifferentiated volume of material. A. 79a.

[7]The requesters argued below, and the District Court found, that the notes necessarily related solely to official matters because State Depart-

for accuracy and completeness or to remove personal and other irrelevant matters. There was no need for this. Those who had access to them — Dr. Kissinger and his closest aides — already knew the substance of the conversations and could obtain the limited information they needed from the unedited materials. A. 245a-46a.

Had Dr. Kissinger known the notes might be viewed as official records, he would have been obliged to put them in proper form for filing.[8] Since he had no duty to create a record of every statement he made over the telephone during his tenure as Secretary of State, he would probably have chosen to discontinue the note-taking altogether rather than undertake this arduous and time-consuming task. A. 246a.

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ment policy prohibited monitoring except when " 'absolutely essential to the conduct of business.' " Pet. App. 56a. This conclusion is based on an inexplicable misreading of a letter from the Department's Acting Assistant Secretary for Congressional Relations to former Congresswoman Bella Abzug. In fact, the letter explicitly states that the general prohibition is subject to an exception which permits "a third party to listen to the telephone conversations of the senior principal officers of the Department for the purpose of taking notes or making appointments and to improve the general efficiency of operations." A. 122a-23a.

[8]Dr. Kissinger's affidavit makes clear that, while some of the notes are substantially verbatim,

> many others are only rough approximations of what was said [containing] misspelled names, omissions, garbled passages, and outright errors of transcription. Although the notes are useful in refreshing my recollections of particular conversations in which I participated, I do not believe they could be regarded as accurate records of my conversations unless they were first corrected and placed in proper form for filing as records. A.249a.

See also 148a-49a, 169a.

The Donation

Near the end of his term, Dr. Kissinger decided to donate papers relating to his career in public life to the United States. He chose the Library of Congress as depository because it already had an extensive collection of papers donated by previous Secretaries of State. A. 246a.

The donation included personal materials collected during Dr. Kissinger's years at Harvard, copies of official documents on which he had worked, and the contents of personal files he had accumulated while in government. To donate the papers relating to his activities as Secretary of State, he had to comply with State Department security regulations and other rules applicable to removal of papers by retiring officials. This he did. A. 246a-49a.[9]

As part of this process, Dr. Kissinger sought and received a written opinion of the Department's Legal Adviser concerning the status of the telephone notes. This opinion confirmed previous oral advice that the notes were not State

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[9]The steps taken to comply with these rules are described in a Donation Procedures Memorandum prepared by the Department's Deputy Undersecretary for Management and initialed by the Legal Adviser, the Assistant Secretary for Administration and the Director of the Foreign Affairs Document and Reference Center. A. 251a-54a. This memorandum sets forth procedures for review by the Department's records officers of Dr. Kissinger's working files to assure that no original records would be inadvertently removed when these files were transferred to the Library of Congress. It also states that, under the Department's rules, papers which had been expressly designated and filed as personal from the time of their origin or receipt could be delivered to the Library of Congress without review. A. 252a. This position is consistent with the Department's view that papers which are clearly designated as "personal" and kept separate from other files are "presumed to be papers in which the individual has the dominant interest — and thus may retain." A. 204a. Each of the persons who signed the memorandum knew that the telephone notes met this description. A. 260a.

Department records.[10] However, as a precaution to assure completeness of the Department's records, the Legal Adviser recommended that the notes be reviewed and extracts made of any discussion of a significant government activity or decision not otherwise reflected in the official files. A. 82a. This, too, was done; the extracts were then delivered to the Department and are presently filed there with the other records of Dr. Kissinger's service as Secretary. A. 248a.

The donation was made in November and December 1976, [11] pursuant to deed of gift agreements signed by Dr. Kissinger and the Librarian of Congress. The donation agreements restrict access to most of the collection for a term of years. A. 43a. Since the telephone notes implicate not only Dr. Kissinger's privacy but also the privacy of those with whom he spoke, the agreements provide that after the initial term expires notes relating to particular conversations may be released only with the consents of those who participated in the conversations. A.46a.

B. Proceedings Below

After the donation was completed and publicly announced, the private respondents filed FOIA requests with

[10]The oral advice was first given in January 1976, when the State Department rejected an FOIA request for a portion of the notes on the ground that the requested documents were not agency records subject to the Act. A. 173a. This advice was repeated on a number of occasions thereafter. A. 247a, 259a-60a, and reduced to writing in a formal legal opinion delivered on November 11, 1976. A. 80a.

[11]The telephone notes had been stored in separate personal files located in Dr. Kissinger's State Department office until October 29, 1976, when, in preparation for his retirement, they were removed and placed for safekeeping in a bank-type vault at the Pocantico Hills, New York, estate of then Vice-President Rockefeller. A. 247a-48a. They were delivered directly from this location to the Library on December 28, 1976. A.249a.

the State Department seeking access to the notes.[12] The Department denied the requests on two grounds: *first*, that the notes were not "agency records" subject to FOIA and, *second*, that the documents were not in any event within its custody or control. A. 61a, 73a, 78a. Following denial of their requests, respondents brought separate suits — later consolidated — against the Librarian of Congress and Dr. Kissinger as well as the State Department.

On cross-motions for summary judgment filed by respondents and by Dr. Kissinger, the District Court held that the notes made of Dr. Kissinger's conversations when he was Secretary of State were State Department agency records which must be returned to its custody. Pet. App. 58a. It declined, however, to reach the same conclusion with respect to the notes made when Dr. Kissinger was a Presidential Assistant, and rendered summary judgment in his favor on this issue. Pet. App. 59a-60a. Since the State Department period notes had never previously been part of the Department's record system, the District Court's order directed the Department to take possession of them, to read them to determine which portions are subject to FOIA disclosure and, thereafter, to release all non-exempt portions to the requesters. Pet. App. 60a-61a.

On cross-appeals by Dr. Kissinger and the RCFP respondents, the Court of Appeals affirmed. In a memorandum accompanying its *per curiam* order, the court stated it was in "full agreement on all issues with the opinion of the District Court . . . and its orders issued pursuant thereto . . . ." Pet. App. 49a. It also stated that the District Court had properly rejected the RCFP claim to the White House period notes because

> (1) The Freedom of Information Act does not extend to those of the President's advisors who are

[12]The MAP requests were filed on December 28 and 29, 1976. A. 69a, 71a. The RCFP request was filed on January 13, 1977. A. 56a.

so close to him as to be within the White House rather than the Executive Office of the President. (2) The mere relocation of these documents to the State Department without any indication that they were used by that agency does not render them State Department records obtainable via an FOIA request to that department. (3) The speculation that some of these earlier transcripts concerned the affairs of the National Security Council adds nothing to plaintiffs' claim because no FOIA request was made of the Security Council and, as mentioned above, the transfer of the notes to the State Department does not change their character. Pet. App. 49a-50a. (citations omitted).[13]

SUMMARY OF ARGUMENT

1. At issue in this case are rough notes made of Dr. Kissinger's telephone conversations when he was Assistant to the President for National Security Affairs and, later, Secretary of State. These telephone notes were part of a collection of materials and documents which Dr. Kissinger donated to the Library of Congress, as custodian for the United States, when he retired from public office. After the notes had been transferred to the Library, the private respondents filed FOIA requests with the Department of State seeking access to them. The Department denied their requests; they then sued it under FOIA to contest the denial. In this suit they joined Dr. Kissinger and the Librarian of Congress and asked for an order directing them to transfer the notes to the State Department.

The District Court granted that relief on the theory that

[13]This Court stayed the District Court's order pending a decision on the merits in the Court of Appeals. The Court of Appeals has stayed issuance of its mandate pending this Court's decision of the case.

Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1975), authorizes declaratory and injunctive relief against persons who are not "agencies" when this is necessary to the enforcement of FOIA. That theory conflicts with the language of the Act. FOIA authorizes courts to order agencies to cease "withholding" records they are obliged to produce; it does not authorize courts to order agencies to procure documents they do not have, or to direct third parties to deliver documents to agencies so agencies can respond to requesters. Nothing in *Bannercraft* suggests that a court may create equitable remedies to cure what otherwise would be a lack of subject matter jurisdiction; the court should have dismissed requesters' suits for failure to state a claim on which relief could be granted.

2. Since the court lacked subject matter jurisdiction, there was no need for it to decide whether the notes made when Dr. Kissinger was Secretary of State were State Department agency records. In any event, the notes are not "agency records." They are rough memoranda, used only as work aids. They reflect personal conversations, thoughts, opinions, and beliefs which have no place in official records. They were never filed or used as official records, but were always kept separately in Dr. Kissinger's personal files. The State Department's regulations, like those of other agencies, classify such papers as non-record materials which an employee may retain or discard as he chooses.

Here the State Department specifically determined — both before and after the donation — that under its rules the notes were not "records." The courts below chose to ignore the Department's application and interpretation of its rules, and found instead that the notes are records because the Department had a common law right to own and possess them. This was error. Common law ownership concepts are inapplicable when the issue is whether documents are "agency records". The Department's conclusion that the notes were not its records was neither ar-

bitrary nor capricious nor an abuse of discretion nor was it contrary to law. The District Court's unexplained refusal to accept that conclusion was error.

3. The order below is unconstitutional. Although the District Court found the notes were "personal in some respects," Pet. App. 58a, it nonetheless directed the State Department to take possession of and read them all. None — regardless of content — is to be returned. Requesters have argued that *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), provides support for the privacy invasion which this extraordinary procedure contemplates. If *Nixon* was, indeed, the inspiration for the order, we believe the courts below seriously misapplied it. If *Nixon* does not support the order, there is no decision of this or any other court which could possibly justify it.

4. Cross-petitioners contend that the conclusion reached below as to the State Department period notes should also apply to the notes made when Dr. Kissinger was a Presidential Assistant. That argument fails if this Court resolves either of the first two issues in Dr. Kissinger's favor, but it cannot in any event succeed. Under no theory could the notes of Dr. Kissinger's conversations as a Presidential Assistant be "agency records" of the Department of State. Cross-petitioners' attempts to avoid this fundamental fact — first by arguing that the White House period notes became State Department agency records because they were once stored there in Dr. Kissinger's private files, and then by speculating that some of the notes may be agency records of the National Security Council — are unsupported by evidence and, accordingly, must be rejected.

ARGUMENT

I. THE REQUESTERS' COMPLAINTS SHOULD HAVE BEEN DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

FOIA provides that a district court

> has jurisdiction to enjoin the *agency* from *withholding agency records* and to order the production of any *agency records improperly withheld* from the complainant. In such a case the court . . . may examine the contents of such *agency records* in camera to determine whether such records or any part thereof shall be *withheld* under any of the exemptions set forth in subsection (b) of this section . . . . 5 U.S.C. §552(a)(4)(B) (emphasis added).

This language plainly states that "withholding" of "agency records" by an "agency" are the operative facts which bring the Act's enforcement provisions into play.[14] Does an agency "withhold" documents when it does not have them? Does authority to order production of "agency records" that are "improperly withheld" include authority to order the agency to obtain documents it does not have so it can comply with an FOIA request? If not, can a court cure what would otherwise be a lack of subject matter jurisdiction by

[14] Paragraph (a)(4)(B) is not the only place where such language is used. *See, e.g.*, 5 U.S.C. §552(a)(4)(F) ("Whenever the court orders the production of any *agency records improperly withheld* from the complainant . . . and the court additionally issues a written finding that the circumstances surrounding the *withholding* raise questions whether agency personnel acted arbitrarily or capriciously with respect to the *withholding*, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the *withholding*.") (emphasis supplied); 5 U.S.C. §552(b)(3) (exempting from disclosure matters that are specifically so exempted by statute.

ordering persons who are not "agencies" to deliver documents to the agency?

We think all of these questions must be answered in the negative. The language and structure of the Act, its relation to the Federal Records Act, and the relevant case law all support the conclusion that FOIA has no application to documents that are not in the custody or control of an agency when a request is filed. The District Court's belief that this statutory limitation could be overcome by ordering third parties who are not "agencies" to deliver the documents to the agency is erroneous. The requesters had no cause of action against Dr. Kissinger, against the Librarian, or against the Department of State. Their complaints should, accordingly, have been dismissed.

A. FOIA Does Not Apply To Documents Not In The Custody Or Control Of An Agency.

It is settled that the Act's disclosure policies do not require an agency to *create* records, even though the agency's failure to do so deprives the public of information which might otherwise have been available to it. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975); *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 192 (1975). The reason is found in the clear distinction the Act makes between "information" and "records." Subsections (a)(1) and (a)(2) impose an affirmative duty to make available specific categories of "information;" subsection (a)(3) requires only that "records" be produced. The duty to provide the specific categories of information set forth in subsections (a)(1) and (2) includes a

provided the statute either "requires that the matters be *withheld*" or "establishes particular criteria for *withholding* or refers to particular types of matters to be *withheld*") (emphasis supplied). The Privacy Act, which is modelled on FOIA, employs similar language. *See* 5 U.S.C. §552a(g)(3)(A).

duty to reduce the information to writing if that has not already been done. By contrast, the duty to provide "records" only requires production of

> documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 162.

If an agency has no independent duty under FOIA to create documents it does not choose to make, logic suggests that it also has no independent duty to obtain documents it does not want simply because an FOIA requester has asked for them. This, indeed, has been the established construction of the Act since its inception.

Following FOIA's enactment in 1966, the Attorney General issued guidelines for the use of all federal departments and agencies in complying with the new statute. The guidelines state that FOIA

> refers, of course, only to records in being and in the possession or control of an agency. . . . [It] imposes no obligation to compile or procure a record in response to a request. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, 23-24 (June 1967).

A number of lower federal courts have reached the same conclusion. *Nolen v. Rumsfeld*, 535 F.2d 890, 891 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977) (suit "seeking production of missing records . . . is not within the purview of" FOIA); *Nichols v. United States*, 325 F.Supp. 130, 137 (D.Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972) ("the Court may not require production of records not in the custody or control of an agency"); *Ciba-Geigy Corp. v. Mathews*, 428 F.Supp. 523, 532 (S.D.N.Y. 1977) ("the Government cannot be compelled to

obtain possession of documents not under its control or furnish an opinion when none is written").

In *Forsham v. Califano*, 587 F.2d 1128 (D.C. Cir. 1978), *cert. granted*, 47 U.S.L.W. 3740 (No. 78-1118, May 15, 1979), the issue was whether FOIA applied to raw data used by a private consulting group as the basis for a research report it had prepared for an agency. These data had been retained by the consulting group, subject to the agency's right by contract and by regulation to review and copy them. The requesters argued that the data should be treated as "agency records" for FOIA purposes because the agency had conceived the project, funded collection of the data, and made administrative decisions based on the research results. They also said the agency's access rights gave it "complete dominion and control" over the data. *Id.* at 1136.

The court rejected the idea that the data could be "agency records" simply because the agency had access rights which it did not choose to exercise:

> Plaintiffs' claim is in effect an assertion that the federal government should be required — formally or constructively — to exercise its contract-grant right of access in order to provide general public access. We cannot accept this proposition. The Freedom of Information Act only gives a right of access to agency records in existence. It does not confer a right to have the government generate agency records, either by creation, subpoena or contract demand. This conclusion is implicit in *NLRB v. Sears, Roebuck & Co.* . . . .

> The governing principle is that only if a federal agency has created or obtained a record (or has a duty to obtain the record) in the course of doing its work, is there an agency record that can be demanded under FOIA. *Id.* (footnotes omitted)

In a footnote to the majority opinion, Judge Leventhal explained that there may be occasions when an agency has a legal duty to obtain particular documents not then in its possession. *Id.* at n.18.[15] On such occasions, he thought FOIA might be joined with a mandamus action to secure access to the documents.[16] His point, of course, was that the claim to require the agency to disclose a document is wholly separate from the claim to require the agency to obtain it. The latter claim cannot be founded on FOIA, which imposes no duty to procure documents, but must have an independent basis in law if it is to be enforced. Since in *Forsham* there was no independent legal basis upon which an order to require the agency to exercise its access rights to

[15]This portion of the opinion was *dictum*, as Judge Leventhal acknowledged. *Id.* Judge MacKinnon, concurring, expressly reserved judgment "as to the extent to which the FOIA should be interpreted to cover records not created by, obtained by, or in the possession of an agency." *Id.* at 1139.

[16]Judge Leventhal gave no examples of cases where mandamus might be used to require an agency to procure a record. He did, however, remark that "[o]bviously a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee." *Id.* at 1136 n.19. We agree that the agency cannot circumvent FOIA in this manner, but think the reason is that the agency would have constructive possession of its records through the bailee. If the agency has the capacity to produce its records by instructing the bailee to return them, refusal to do so plainly would be a "withholding" within the meaning of 5 U.S.C. §552(a)(4)(B). However, if the agency must take some other step to obtain the documents, such as issuing a subpoena, its failure to act does not constitute a "withholding" and therefore cannot violate FOIA.

the data could be grounded, the proper remedy was dismissal.[17]

That analysis is fully consistent with this Court's reasoning in *Sears* and in *Grumman*. As Mr. Justice White observed in *Grumman*, the Act

> imposes no *independent* obligation on agencies to write opinions. It simply requires them to disclose the opinions which they do write. 421 U.S. at 192 (emphasis added).

The point is that FOIA does not purport to tell agencies what documents to create, maintain or otherwise possess as records; it simply requires agencies to disclose such " agency records" as they have chosen to keep.

FOIA applies when the agency improperly withholds its "records," but it does not apply when the requesters' complaint is addressed to alleged deficiencies in the agency's recordkeeping practices. This is true whether the complaint relates to the agency's failure to create documents the requesters think it should have created — as in *Sears* and

[17]Judge Bazelon, dissenting, thought lack of possession need not be controlling in cases where the right to possession existed and could easily be exercised. However, he agreed that

> the Government's right of access . . . is important for FOIA purposes since it establishes the basis for Government compliance with FOIA requests. Obviously, the Government must be able to obtain copies of requested agency "records" quickly and without legal impediment. For example, if the Government had to purchase certain data or subpoena certain records to comply with a FOIA request, these materials might not be considered agency "records." *Id.* at 1143-44.

Whatever the general merits of the dissenting view, it is clear that Judge Bazelon would not stretch FOIA so far as to require an agency to sue for possession of documents it does not have. When the agency's ability to produce the documents is thus impaired, the case ceases to be an FOIA action and must proceed, if at all, on some other basis.

Grumman, to the agency's failure to add to its records system documents the requesters want to see — as in *Forsham* and *Ciba-Geigy v. Mathews*, or to the agency's failure to retain control over documents the requesters think it should have kept — as in *Nolen v. Rumsfeld* and *Nichols v. United States*. In all of these cases, the requesters' complaints were dismissed upon a showing that the agency lacked possession of the documents. There was no further inquiry as to why the documents were not there, because complaints addressed to this issue transcend the limits of FOIA.[18]

B. FOIA Does Not Authorize Equitable Relief Against Persons Who Are Not Agencies.

The District Court, of course, recognized that FOIA could not apply unless the State Department first obtained possession of the notes, just as it evidently recognized its lack of authority to order the Department to procure them. But the court thought it could avoid this statutory limitation by invoking its "broad equitable powers" to compel Dr. Kissinger and the Librarian to deliver the notes to the Department so the Act *would* apply. Pet. App. 55a.

The District Court said its solution is supported by this Court's opinion in *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974). *Bannercraft*, however, says

[18]The above cases may be contrasted to others where the issue was whether documents in an agency's custody were its records. *See Goland v. CIA*, No. 76-1800 (D.C. Cir., May 23, 1978) (Congressional document); *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968) (judicial records). In such cases a court does have jurisdiction to determine whether the documents are agency records, because the agency has the capacity to produce them once that decision is made. It is, however, pointless to consider whether documents are "records" if the agency could not be ordered to produce them. When this is the case, the agency's lack of possession is dispositive because the court's lack of authority to order it to obtain possession is dispositive.

nothing about the power of a district court to order an agency to procure a document it does not have, or to order persons not subject to the Act to deliver such documents to an agency.

The documents at issue in *Bannercraft* were official agency records in the custody of the Renegotiation Board. The only question was whether 5 U.S.C. §552(a)(4)(B) authorized enjoining further Board proceedings until such time as the Board produced records it was wrongfully withholding. The Court held the injunction was improper in the case before it, because this would interfere with established procedures for renegotiating government contracts. In doing so, it also said that an injunction against withholding documents was not the sole equitable remedy authorized to aid in enforcing the Act. 415 U.S. at 17-20. The District Court read this passage as a blanket authorization to employ any form of equitable relief which furthered its "role as the 'enforcement arm' of the Freedom of Information Act." Pet. App. 55a. We believe this is an egregious misreading of *Bannercraft*.

FOIA applies only where an *agency* improperly *withholds* records. A court's power to afford *any* relief under this statute depends on the existence of these jurisdictional facts. The only "agency" before the District Court was the Department of State, which did not possess and therefore was not "withholding" the documents requesters said they wanted. Since the Act could not apply to the agency defendant, it surely could not apply to anyone else. The District Court's notion that it could use "equitable powers" against third parties to *create* jurisdiction over the agency where none otherwise existed is legal nonsense. A court of equity's inherent authority to enforce a statute does not include authority to expand its substantive reach. *See Commercial Security Bank v. Walker Bank & Trust Co.*, 456

F.2d 1352, 1355 (10th Cir. 1972); *Doyle v. Milton*, 73 F.Supp. 281, 284-85 (S.D.N.Y. 1947). There is no indication whatever in *Bannercraft* of any intention to abandon this fundamental juridical principle.

Respondents had no legally enforceable FOIA claim against the State Department, or any right under that or any other statute to sue Dr. Kissinger or the Librarian of Congress. The District Court had no subject matter jurisdiction to enter an order against any of these parties. Rather than seek a "solution" in equity, it should have dismissed requesters' complaints for failure to state a claim upon which relief could be granted.

C. Neither FOIA Nor Any Other Law Authorizes Citizen Suits To Retrieve Agency Records.

Although the private respondents' suits were ostensibly based on FOIA, the essence of their complaints was that the telephone notes were State Department agency records which never should have been transferred to the Library. In substance, their suits were *qui tam* actions brought to recover for the State Department property the Department did not itself claim. But FOIA confers no such rights.

FOIA assumes the existence of "agency records," without defining what they are, because Congress expected the agencies to make that determination for themselves. "Agency records" means documents an agency has chosen to incorporate into its records system — not documents that journalists, historians, political scientists or other members of the general public think the agency should have in its files. The Act — despite its important public information function — was never intended as a device to usurp agency recordkeeping decisions. The notion that it authorizes citizen suits to require agencies to augment their

files simply cannot be squared with the purposes and policies of the Federal Records Act.[19]

The provision of FRA which deals specifically with recovery of unlawfully removed agency records is 44 U.S.C. §3106. That section requires the head of each federal agency to notify the Administrator of General Services "of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is head that shall come to his attention . . . ." It further states that the agency head shall, with the assistance of the Administrator, "initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency. . . ."

Although requesters disclaimed reliance on any statute other than FOIA,[20] it seems clear that their suits were designed in one way or another to enforce 44 U.S.C. §3106 — either by means of a private right of action under FRA or by implying the same remedy under FOIA. It is equally clear that there is no basis on which either approach could be allowed.

[19]We use the term "Federal Records Act" generically to denote a series of statutes enacted to deal with agency recordkeeping responsibilities, including the Records Disposal Act of 1943, the Records Act of 1950, and the Federal Records Management Amendments of 1976. These and related statutes are now codified in 44 U.S.C. Chapters 29, 31 and 33. For a useful description of FRA's historical evolution, *see* National Study Commission on Records and Documents of Federal Officials (hereinafter "National Study Commission"), *Memoranda of Law*, 87-103 (1977).

[20]*See* Brief for Appellees Military Audit Project, *et al.*, 17, filed in the Court of Appeals on May 24, 1978, and the following pleadings filed by the RCFP requesters in the District Court: Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for a Preliminary Injunction, 6-7 (May 10, 1977); Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, 18-19 (Aug. 8, 1977).

1. No private right of action can be implied under 44 U.S.C. §3106.

To determine whether a private remedy is implicit in a statute not expressly providing one, the relevant questions are whether the plaintiff is one of a class for whose especial benefit the statute was enacted, whether there is any indication of a legislative intent to create such a remedy, and whether it is consistent with the underlying purposes of the legislative scheme to imply the remedy. *Cort v. Ash*, 422 U.S. 66, 78 (1975); *accord*, *Cannon v. University of Chicago*, No. 77-926, *slip op.* at 9-10 (S.Ct., May 14, 1979); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37-41 (1977).[21]

Requesters meet none of these tests.

First, there is no indication whatever that 44 U.S.C. §3106 or any other provision of FRA was intended to benefit persons such as the requesters. The purpose of the legislation is to regulate the internal records creation and management practices of the Executive Branch of the Government. The statute does not mention any special class of persons whom its provisions are intended to protect or benefit; indeed, it is clear that the recordkeeping duties it creates are for the benefit of the public at large. This Court has been especially reluctant to imply a private right of action in such cases. *See Cannon v. University of Chicago*, *slip op.* at 11n.13, p.13.

Second, the legislative scheme points to denial of a private remedy.

Under FRA, each agency has responsibility for creating and preserving its own records. 44 U.S.C. §3101. In performing these duties, the agency acts in cooperation with the Administrator of General Services, 44 U.S.C. §3102(2),

[21]A fourth factor — irrelevant here — is whether the asserted cause of action is one traditionally relegated to state law.

who provides advice and guidance on standards and procedures for efficient records management. 44 U.S.C. §2904. In implementing his responsibilities, the Administrator is entitled to obtain reports from the agencies on their recordkeeping activities, 44 U.S.C. §2111, and to inspect the records of an agency "for the purpose of rendering recommendations for the improvement of records management practices and programs." 44 U.S.C. §2906. If he finds the agency's recordkeeping practices are not in accordance with law, he may inform the head of the agency of his findings and make recommendations for corrective action. 44 U.S.C. §2111. If the corrective action is not taken, he is directed to "submit a written report of the matter to the President and the Congress." *Id.*

This comprehensive program for records management involving the agency, the Administrator of General Services, the Attorney General, the President and the Congress, provides no place for the intrusion of private parties.

Finally, allowance of a private action would undermine the purposes of the Act by interfering with the Government's regular procedures relating to the creation, maintenance and disposition of records. The decision to file a particular document as a "record" is made by the agency, acting alone; the decision to discard a record once it has been filed is for the agency and the Administrator, acting together, with final authority vested in the Administrator. The decision to recover a "wrongfully removed record" requires the concurrence of the agency, the Administrator, and the Attorney General, with possible recourse to the President and the Congress in the event they do not agree. It would be wholly inappropriate for the Judiciary to intervene in such an area at the instance of private litigants.

2. No supplemental retrieval remedy can be implied under FOIA.

The District Court acknowledged the existence of the statutory remedy, but concluded that the requesters need not "wait for institution of the statutory retrieval action" where government action "appears unlikely." Pet. App. 55a. Its solution was to supplement the statutory retrieval action by implying a similar remedy under FOIA. This approach was based on the erroneous belief that *Bannercraft* authorized use of equitable powers to expand FOIA's scope. That mistake in turn distracted the court from what should have been its primary inquiry. The real question — ignored below — was whether it is consistent with the statutory scheme to allow members of the general public to invoke FOIA as a vehicle for retrieving documents which the agency does not seek or claim.[22]

Under standard principles of statutory construction, "a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. General Services Administration*, 425 U.S. 820, 834 (1976); *see also National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 301 (1943). We think the comprehensive nature of the FRA

[22]The question is important, because FOIA is an exceptional statute. The Act dispenses entirely with the requirement of standing; any member of the public may invoke its remedies without regard to need or interest. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 143n.10. The Act also provides for *de novo* review of agency decisions to withhold records on grounds of exemption, and in such cases reverses the usual rules on burden of proof. *See Department of the Air Force v. Rose*, 425 U.S. 352, 379 (1976). If these exceptional features of the Act are not confined to cases where an agency is "withholding" records, the result will be a dramatic extension of judicial power to review agency recordkeeping decisions free of the usual restraints applicable to judicial review of agency action.

regulatory system, together with the very detailed provisions that statute makes for institution of record retrieval actions, belies any suggestion that Congress expected FOIA injunctive suits to be used as a substitute for FRA retrieval actions. This is particularly true where, as here, it is clear that no private action could be maintained under 44 U.S.C. §3106.

In any event, before presuming that FOIA may be invoked to supplement the specific FRA remedy, it would at least be necessary to find support for this view in the legislative history of FOIA. *See Brown v. General Services Administration*, 425 U.S. at 833-34. This history, however, is consistent only with the opposite conclusion.

FOIA has been the subject of intense Congressional interest since its enactment in 1966. It has twice been substantively amended, in 1974 and again in 1976, and on both occasions the amendments were in part prompted by a desire to reverse court decisions with which the Congress did not agree.[23] Despite this close scrutiny, Congress has never indicated it disagrees either with the Attorney General's view that the Act cannot be used to force agencies to procure documents or with the lower court decisions which reach the same conclusion.

The same committees that considered the 1974 and 1976 amendments to FOIA were simultaneously working on the legislation that was enacted in 1974 as the Privacy Act, and on the substantial revisions to FRA which were adopted as the Federal Records Management Amendments of 1976. The FRA revisions contain no hint that agency recordkeeping decisions shoud be subject to judicial review at

[23]The 1974 amendments, in particular, were the product of careful oversight hearings which involved both a study of agency practices under FOIA and court decisions construing it. *See* H.R. Rep. No. 93-876, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6267, 6268-70.

the instance of private citizens. The Privacy Act, however, expressly provides for judicial review if an agency "fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the . . . individual . . . ." 5 U.S.C. §552a(g)(1)(C). It also authorizes the individual to request amendment of agency records relating to him, 5 U.S.C. §552a(d)(2), and empowers a court to order the agency to make the amendment. 5 U.S.C. §552a(g)(2)(A).

The provisions of the Privacy Act show that Congress knows how to provide for judicial review of agency recordkeeping determinations when it wishes to do so. That such provisions originated with the same committees which then were engaged in revising FOIA and FRA is convincing evidence that the omission from these statutes of any similar procedures for review of agency recordkeeping determinations was intentional. We think this history shows that Congress did not expect agency recordkeeping decisions to be subject to any form of judicial review except in the limited circumstances defined in the Privacy Act. Certainly the opposite inference — that Congress intended FOIA to authorize virtually unlimited review of agency decisions to create or procure or file or retain documents as records — must be rejected.

* * *

Despite this history, requesters argue that FOIA *should* be construed to give private citizens the right to sue to obtain documents they believe an agency should have in its files. Their reasons are based on conjectural fears that FOIA may be circumvented if private citizens are not permitted to police agency recordkeeping practices. They say:

> The broad disclosure responsibilities imposed by the Act could be easily evaded if the Act ceased to apply as soon as agency records left the physical

> custody of the agency. Agency employees could simply take home or store with friends documents that they considered politically sensitive or personally embarrassing. Similarly, such documents could be transferred to sister branches of the government, like the Library of Congress, to which the Act does not apply . . . . Agency officials, unwilling to take action against offending employees or perhaps relieved that damaging information had been suppressed, could simply stand by idly without attempting to retrieve the documents that had been improperly removed from agency custody. Brief for Respondents Reporters Committee for Freedom of the Press, *et al.* in Opposition, 21 (Feb. 5, 1979).

At the outset, we note that this is not a case where any "evasion" of FOIA has been alleged, much less proved. Requesters' speculation about what might happen in other cases cannot obscure the fact that in this case their requests were filed *after* Dr. Kissinger had transferred the notes to the Library of Congress. This transfer was made near the end of Dr. Kissinger's term, in connection with his retirement from office, pursuant to written procedures approved by the Department's chief administrative officers. In making the transfer, Dr. Kissinger complied with every rule applicable to retiring Department employees.[24] He also ob-

[24]Requesters argued below that Dr. Kissinger should have submitted the telephone notes — which were stored in his personal files — for review by the Department's records officers before removal. There is no such requirement. The Department's regulations expressly recognize that papers which have been "explicitly designated or filed as personal at the time of origin or receipt may be removed . . . without approval of the Director, Foreign Affairs Document and Reference Center." 5 FAM §417.1a. The Department's chief administrative officers — including the Director of FADRC—knew the telephone notes were in Dr. Kissinger's personal files when those files were transferred to the Library of Congress. A.260a. Each expressly approved the transfer. A. 252a, 254a. *See* p. 7 n.9, *supra*.

tained a written opinion of the Legal Adviser that the notes were personal papers he was entitled to retain. Requesters may disagree with that opinion, but disagreement provides no reason to claim "evasions" will occur if this Court does not accept the extreme construction of the Act they advocate.[25]

But the principal defect in requesters' position is the assumption that the Act's inherent limitations may be ignored. The answer to this was provided in *Forsham*:

> [T]he general policy of avoiding agency secrecy does not give a charter for extending the law beyond the domain of "agency" and "agency records" that is the keystone of the Act. . . . Congress struck a balance in fashioning the FOIA, which precludes the boundless pursuit of one policy goal, even a dominant policy, to the exclusion of all countervailing considerations. . . .
>
> What is requested in this action, in our view, is an extension of the statute on claim of public interest that must be appraised by the legislature which can give the subject extended study, elicit opinions from all interested sources, and consider the pro's and con's. 587 F.2d at 1137-38.

Congress has already made clear that it did not intend FOIA to serve as a general charter for private attorneys

[25]We think the most effective check against "abuses" by retiring officials is the authority their successors have to initiate retrieval actions under 44 U.S.C. §3106 when this is deemed necessary to preserve the integrity of the agency's records systems. That the Department of State has not initiated such an action in the more than two years since Dr. Kissinger left office is evidence that the Department has the records *it* needs to conduct *its* business. What requesters are really saying is that the Department should take action to secure documents *they* want for *their* purposes, and that if it will not assist them this Court should do so by implying a retrieval remedy under FOIA. We doubt that Congress ever expected FOIA would be used for such dubious purposes.

general to police the recordkeeping activities of government agencies. If that statutory limitation is to be eliminated, Congress, and not the courts, should make the change.

* * *

The decision below represents a hopeless confusion of ideas. Had the private respondents sued only Dr. Kissinger and the Librarian, it would have been obvious that they had no standing under FOIA, FRA, or any other law to assert an ownership claim the State Department did not choose to make. *Cf. Nichols v. United States*, 460 F.2d at 674-75. Had they sued only the State Department, it would have been equally clear that they could not use FOIA, FRA or any other law to compel it to assert its ownership interests against Dr. Kissinger. Why respondents' positions were improved by indiscriminately mixing separate claims in a single count was not explained, and in our view cannot be explained.

The simple truth is that respondents' complaints failed to state a cause of action on which relief could be granted. The failure to recognize this below, and rule accordingly, was error.

II. THE NOTES MADE OF DR. KISSINGER'S TELEPHONE CONVERSATIONS WHEN HE WAS SECRETARY OF STATE ARE NOT "AGENCY RECORDS" SUBJECT TO FOIA.

One thing is certain: the telephone notes do not resemble official government records. They are rough, unedited typewritten materials which were never part of the State Department's records system. They were used only as work aids, to promote efficiency of operations in Dr. Kissinger's office. They were not intended to be the permanent records of Dr. Kissinger's decisions and actions, and cannot even be said to be accurate summaries of his conversations. A. 109a, 169a. The State Department, in common with other

agencies of the government, has never treated materials of this type as records.

The question of the notes' status was first raised at the State Department in January 1976, when an FOIA request was made for a portion of them. The claim was denied because the notes "have not been preserved as evidence of Department of State business." A. 172a. This position was reaffirmed on November 11, 1976, when the Legal Adviser concluded that "under Department of State regulations and other legal criteria, these particular papers are personal and may be retained by you when you leave office." A. 84a. The same view was again confirmed on January 28, 1977, and March 4, 1977, when the Department denied the private respondents' FOIA requests.[26]

The State Department's conclusion that the notes were not its records was based on its regulations and customary practices, as it interepreted them. The opinion of the Legal Adviser explains in detail why that decision was proper. When the District Court reached a contrary result, it did not hold the State Department's regulations were invalid, or find that the Department had improperly applied them, or explain why the Legal Adviser's opinion was wrong. It ignored these matters altogether, and held instead that the notes were Department records because they were the "property of the United States." Pet. App. 58a. This

[26]Requesters argue the State Department made no "decision" because the Legal Adviser and other persons involved were Dr. Kissinger's subordinates. *See* Brief For Respondents Reporters Committee For Freedom of the Press, *et al.* in Opposition, 14-15 (Feb. 5, 1979); Brief of Respondent Military Audit Project, *et al.* in Opposition to Petition for Certiorari, 5 (Feb. 6, 1979). The Legal Adviser, a respected member of the bar, was within weeks of his departure from office. Equally important, the requesters forget that their FOIA requests were denied *after* Dr. Kissinger had left office, by persons who were then serving under Secretary Vance. A. 61a, 78a.

holding rests on what the court called "a basic rule of copyright law that work created by an employee within the scope of employment is the property of the employer." Pet. App. 56a.

That conclusion cannot be accepted even as an adequate statement of the "basic rule" it purports to apply.[27] But the relevant question is not who "owns" the notes. Requesters' case is based on FOIA, which applies only to "agency records." Whether the notes are "agency records" is properly resolved by the Federal Records Act and the regulations adopted to implement it, not by analogies drawn from common law "ownership" concepts.[28]

[27] The copyright cases the District Court cites make clear that the underlying question is whether the contested literary or artistic work was created by the employee for his employer's use pursuant to an express or implied contractual obligation. *See, e.g., Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970). Whether Dr. Kissinger had an obligation to create the notes can only be determined by reference to the Department's rules and practices. Dr. Kissinger's duty as a government employee was to document his significant oral decisions, commitments and discussions. 5 FAM §423.2-1. This he did — not with the notes but with memoranda and other official documents and with the extracts he later made from the notes to assure completeness of the official files. The notes used in the preliminary stages of this documentation process were of no interest to his "employer," and he was free under the Department's interpretation of the employment relation to retain or discard them as he chose.

[28] The District Court's "ownership" theory suffers from another difficulty. The basic rationale — that any document produced by a federal employee on government time using government resources is government property — applies with equal force to unofficial papers created by the President and Vice-President, by Congressmen, and by members of the Judiciary. Some of these federal officials have, like cabinet officers, donated collections of papers to libraries with no suspicion whatever that the act of donation represented an illegal alienation of government property. *See* J. Broderick, *Personal Papers of Federal Officials* (Library of Congress 1976); National Study Commission, *Study of the Records of Supreme Court Justices* (1977). If the decision below stands, all restrictive covenants relating to such donations are vulnerable to challenge on the theory that the donor did not "own" the papers and thus had no right to control the manner of their disposition. *See Nixon v. Sampson*, 389 F.Supp. 107, 120-23, 133-45 (D.D.C.), *stayed sub nom. Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975), *dismissed as moot*, 437 F. Supp. 654 (D.D.C. 1977), *rev'd and remanded for trial*, No. 77-2123 (D.C. Cir., Dec. 21, 1978).

A. The Applicable Statutes And Regulations Support The Conclusion That The Notes Are Not "Agency Records."

The statutory definition of records is set forth in 44 U.S.C. §3301:

> 'records' includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or *appropriate for preservation by that agency* or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government or because of the informational value of data in them. . . . [E]xtra copies of documents preserved only for convenience of reference . . . are not included. (Emphasis added)

This definition does not, as the District Court assumed, require that every document generated by a government employee in the performance of his duties be treated as an official record. It expressly limits "records" to documents that are "appropriate for preservation" as evidence of an agency's "organization, functions, policies, decisions, procedures, operations or other activities."

The limitation is not inadvertent. Congress has repeatedly stressed the need for restraint in the creation of records. In 1943, when 44 U.S.C. §3301 was first enacted, the House Report stated that the definition of records

> would make it clear that [the agencies] are not obliged to consider every scrap of paper on which writing or printing appears as a record. H.R. Rep. No. 559, 78th Cong., 1st Sess., *reprinted in* [1943] U.S. Cong. Serv. 2140, 2141.

This was reemphasized in 1950, when the Senate Committee stated that

> [r]ecords come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, *or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them.* There is danger of this simple, self-evident fact being lost for lack of emphasis. *The measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization.* S. Rep. No. 2140, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Code Cong. Service 3547, 3550 (emphasis added).

The Federal Records Management Amendments of 1976 made the point explicit by inserting into the statute an express declaration that one of the purposes of records management is to establish "mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records." 44 U.S.C. §2901(3).

Rules adopted by the State Department under FRA reflect the same concerns. The Department's general policy on records creation recognizes that there is a need both to

"insure that important policies, decisions, and operations are adequately recorded" and to prevent the "accumulation of unnecessary files." 5 FAM §422.1. Its specific recordkeeping rules repeatedly emphasize that their objective is to record "important," "necessary," "essential," "significant," and "pertinent" information. *See* 5 FAM §§422.1, 423.1, 423.2, 423.2-1, 432. Contrary to the District Court's assumption, the Department does not seek to capture every paper produced by its employees on government time using government resources and materials. Its intent, rather, is to assure that the information needed to serve its administrative purposes is adequately recorded and preserved.

This principle is reflected in the regulations which apply to various kinds of informal papers that are made or received by Department employees. For example, 5 FAM §432 provides that

> [w]hen official policy matters are discussed in personal correspondence, that portion pertaining to functions or activities of the Department . . . is to be extracted and made a part of the official records.

The regulation does not require that the entire letter be filed simply because some of its contents pertain to official business; only the pertinent provisions are to be included in the Department's records. Moreover, the Department has explained that "in practice" the rule applies only to "papers containing a discussion of Department activities or decisions not otherwise reflected in existing Department records." A. 204a.

The same principle applies to an employee's duty to create a record of business transacted orally. That duty is set forth in 5 FAM §423.2-1:

> Decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record. The information should be written in the form of aide-memoire, memorandums of conversation, or memorandums to the file.

Again, the emphasis is on documentation of decisions, commitments and significant discussions; there is no duty to create a record of *every* conversation, or to memorialize *everything* which is said in *any* conversation.

Finally, 5 FAM §423.2-8 provides that

> [r]ough drafts and working papers, such as preliminary notes, do not constitute required documentation unless they form an integral part of the finished document or show changes in policy.

Preliminary materials of this type are used in making the agency's official records. When the finished documents are filed, the agency has no further interest in the preliminary materials. *See* A. 204a, 221a.

These regulations make clear that the Department's interest is in finished documents, not in rough drafts, notes, or personal correspondence. They also confirm what common sense suggests: government employees routinely generate large quantities of written materials which, though made or received in performance of their official duties, are nonetheless not treated as "records." Such "non-record materials" are not filed because they do not constitute "required documentation." Indeed, the Federal Property Management Regulations, which provide guidance to all federal agencies, affirmatively require that

> [n]on-record materials, such as . . . preliminary worksheets, and similar papers that need not be made a matter of record, *shall not be incorporated in the official files of the agency.* 41 C.F.R. §101-11.401-3(d) (emphasis added).

It has long been recognized that senior government officials generate notes, work aids, office diaries, and similar materials that are not "records" even though they pertain to the transaction of public business. Such materials have traditionally been kept separately from the official records of the agencies, and treated as personal papers of the official who generated them.

This practice was officially noticed in a 1959 Cabinet Paper issued during the Eisenhower Administration.[29] That paper, which was the product of a major study of the Records Act of 1950, attempted to formulate guidelines to accommodate the competing policy considerations associated with the existence of these kinds of non-official documents. It concluded that personal work aids, such as office diaries, could lawfully be retained by retiring officials when they left office, provided the removal did not leave a gap in the official records and adequate precautions were taken to prevent unauthorized disclosure of confidential government information. A. 200a-201a.

That this basic approach has not changed is illustrated by the guidelines issued in 1975 by the Office of Management and Budget to implement the Privacy Act. OMB's analysis of the Privacy Act points out that the definitions of "record" and "system of records" in that statute require that the record materials be "maintained by" or "under the

[29] For a description of the Cabinet Paper and its significance in the development of customary practice in this area, *see* National Study Commission, *Memorandum of Findings on Existing Custom or Law, Fact and Opinion*, 60 (1977).

control of" an agency. *See* 5 U.S.C. §552a (a)(4), (5). OMB states that these qualifying phrases were used

> to distinguish "agency records" from those records which, although in the physical possession of agency employees and used by them in performing official functions, were not considered "agency records." Uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion (e.g., personal telephone lists) are not considered to be agency records within the meaning of the Privacy Act. 40 F.R. 28948, 28952 (July 9, 1975).

More recent evidence is provided by a 1977 staff report prepared for the National Study Commission on Records and Documents of Federal Officials. This report, which was based on an empirical study of agency practices,[30] states that

> [f]ederal officials in all branches of government accumulate information in the form of memoranda of conversations, transcripts, speeches, taped conversations, diaries, and correspondence reflecting the private opinions and advice of colleagues and others. Such records are not "personal" in that they do not deal with strictly private affairs and they are not "official" in the sense that they do not directly document the transactions and policies of federal organizations. Such material has usually been treated as personal correspondence. National Study Commission, *Memorandum of Findings on Existing Custom or Law, Fact and Opinion*, 59 (1977).

[30] Some of the agency reports used in the study are set forth in the Appendix to this Brief. *See* A. 199a (Department of State), 210a (General Services Administration), 217a (Department of Defense), 227a (Federal Trade Commission), 232a (Civil Service Commission), 235a (Department of the Interior).

The Commission's own conclusion is that each agency has

> an area of discretion as to non-record materials that officials may be permitted to retain, provided only that such retention does not diminish the official record of the agency, violate confidentiality required by national security, privacy, or other interests protected by law, or abuse normal administrative economies. National Study Commission, *Final Report*, 19 (1977).

The notes of Dr. Kissinger's telephone conversations cannot be distinguished from the drafts, working papers, office diaries, preliminary notes and work aids that the State Department and other agencies regularly have held are not "agency records." The District Court did not even try to make the distinction, because it erroneously assumed that *any* document — regardless of use or content — created by a government employee within the scope of his employment is an "agency record." That assumption cannot be reconciled with the statutory scheme relating to records management, or with agency regulations and practices.

B. The State Department's Decision That The Notes Were Not Its Records Was Not Arbitrary, Capricious, An Abuse Of Discretion, Or Contrary To Law And, Accordingly, Must Be Followed.

The central point of the federal records management statutes is that the responsibility for making records "containing adequate and proper documentation" of an agency's business is vested in the affected agency. 44 U.S.C.

§3101. The structure and history of FRA make clear that it is the agencies which must determine their records needs — not historians, reporters, or other members of the general public. Indeed, one may ask how anyone other than the agencies could decide such matters. Certainly a court could not determine whether a particular document is "appropriate for preservation by that agency," 44 U.S.C. §3301, without full knowledge of the business of the agency and the nature of the official correspondence, memoranda, minutes and other records in its files relating to the same subject matter.

The District Court ignored this practical consideration, and instead ruled that the notes were State Department agency records as a matter of law. We have already demonstrated both that this conclusion was wrong in its choice of the law to be applied, and that application of the proper law would have produced the opposite result. However, we think the decision was also wrong in its assumption that courts are free to disregard an agency's determinations in deciding whether particular documents are "records" of that agency.

In *Udall v Tallman*, 380 U.S. 1, 16 (1965), this Court said:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings" . . . . *When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.* (citations omitted) (emphasis added)

The District Court disregarded this fundamental rule when it substituted its own view of the law for the Department's interpretation of its regulations.

The State Department's conclusion that the notes were not its records was consistent with its interpretation of FRA and of its own regulations. That conclusion was not arbitrary, capricious, or an abuse of discretion. Neither was it contrary to law. The question for the District Court was not whether plausible grounds could be found for other constructions of the regulations. Nor could the District Court substitute its own view of these regulations. It was bound either to defer to the State Department's interpretation, or to explain why that interpretation was wrong. Its failure to do one or the other was error.

C. Fundamental Considerations Of Privacy Support The Conclusion That The Notes Are Not "Agency Records."

Apart from the statutory and regulatory issues, there is another, equally persuasive, reason why the District Court's decision must be rejected. Agency recordkeeping regulations and practices seek to reconcile employee privacy rights with the Government's interest in maintaining adequate records of its business. The District Court's decision that all papers — irrespective of content, purpose or use — produced by government employees on government time are "agency records" ignores this balance. To adopt such a construction in the face of contrary agency practice is unjustified; to do so on a retroactive basis is constitutionally intolerable.

Government employees, like other citizens, do and should have a right to think, to explore, to discard, to develop ideas without fear that their thoughts will be prematurely published. The State Department's regulations and prac-

tices, as well as those of the agencies generally, recognize this fundamental right.

Agencies require employees to document decisions, commitments and significant discussions, *see* 5 FAM §423.2-1; 41 C.F.R. §101-11.202-2(b), but they do not require that every thought and every utterance be recorded. Rough drafts and working papers are not records; preliminary notes are not records; uncirculated papers filed as personal are not records. Such documents are not available to other employees unless the author commits them to official files.

Agencies permit employees to keep personal papers in their offices, and to remove them when they retire or change positions. *See* 5 FAM §§432, 417.1; 41 C.F.R. §§101-11.202-2(d), 101-11.401-6(c); A. 204a, 211a, 218a, 227a, 232a. Agencies may discipline employees who fail to keep proper records of their activities; they do not, however, search for records in their employees' desk drawers and private files. Unfiled and uncirculated papers are presumptively private, *see* A. 204a; they may not be inspected by anyone unless constitutional procedures are followed.

In *Porter County Chapter of the Izaak Walton League v. AEC*, 380 F.Supp. 630 (N.D. Ind. 1974) — a case the courts below chose to ignore — the issue was whether notes made by Atomic Energy Commission staff members "[i]n executing their responsibilities relating to the AEC's health and safety and environmental reviews," *id.* at 633, were "agency records" subject to the Act. The court held they were not:

> Such materials are not circulated to nor used by anyone other than the authors, and are discarded or retained at the author's sole discretion for their own individual purposes in their own personal files. The AEC does not in any way consider such documents to be "agency records," nor is there any indication . . . that anyone other than the author exercises any control over such documents.
>
> . . . [T]he Court finds that these materials are personal notes, rather than agency records. Disclosure of such personal documents would invade the privacy of and impede the working habits of individual staff members; it would preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to disseminate publicly . . . [T]heir disclosure would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials. *Id.*

It is undisputed here that some of the telephone notes contain purely personal conversations having no connection with government business. Other notes, though business-related, reflect personal observations, thoughts, opinions, and beliefs. Many also include expressions of privately held views about politics, personal details concerning third parties, and information relating to Dr. Kissinger's associations with individuals and organizations. A. 245a. This is equally true of statements made by those with whom he spoke. Such matters have no place in public records.[31]

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[31] *Compare United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), in which the court ruled that notes prepared by Lieutenant William Clark while participating in the Lewis and Clark Expedition were not public records, in part because they contained

> a great many personal and private notations, including information about the receipt of newspapers or letters, details

Dr. Kissinger had no duty to make notes of his telephone conversations. His decision to make and keep such notes was predicated on the belief that they were private papers — a belief which was consistent with the State Department's rules, policies and practices. If the position adopted by the courts below had been the law when he was in office, he either would not have made the notes at all or would have edited and corrected them before they were filed as official records. A. 246a. The retroactive — and unprecedented — decision below that these papers are "agency records" frustrates Dr. Kissinger's legitimate expectations of privacy, just as it threatens the privacy rights of all past and present government employees.

Nothing in the facts of this case justifies any such retroactive restructuring of agency recordkeeping rules. The notes at issue here are not documents the State Department wants for *its* records purposes. These notes are documents the requesters say the Department should have wanted, and should have kept, so *they* could read them under FOIA. This ignores the purpose of records — which is to serve the administrative needs of the organizations that create them —in favor of a form of legal voyeurism that perverts FOIA's legitimate purposes. If tighter recordkeeping rules are needed to capture documentary materials which might otherwise be lost to FOIA claimants, they should be adopted on a prospective basis. This would at least give government employees notice of the new environment in which they are to function, and enable them to take appropriate steps to protect their privacy rights.[32]

---

of personal illnesses, social engagements, and other such items as might not be expected to be found in notes of an official character or in an official record. *Id.* at 690.

[32]Whether such regulations would serve the public interest is another question. *See* note 42, *infra*.

The National Study Commission on Records and Documents of Federal Officials has in fact proposed new legislation to declare all documentary materials made or received by federal officials in the course of their official duties to be the records of the agencies where they are employed. *See* National Study Commission, *Final Report*, 3-5 (1977). But the Commission has also recognized that any such legislation should be made prospective to "avoid legal problems . . . and provide notice to Federal Officials as to changes necessary to comply with the recommendations." *Id.* at 8. The Commission's sensible — and sensitive — approach contrasts sharply with the total disregard for privacy rights that is reflected in the decision below.

III. THE DISTRICT COURT'S INSPECTION ORDER IS UNCONSTITUTIONAL.

Although the District Court acknowledged that the notes were "personal in some respects," Pet. App. 58a, it nonetheless directed the State Department to possess and read all of them. None — regardless of content — is to be returned. This procedure is unconstitutional.

Respondents do not deny that the inspection procedures contemplated by the order will involve an invasion of privacy. They simply suggest the intrusion will be "minimal," because public release of the notes can only be made if the "personal privacy" exemption of 5 U.S.C. §552(b)(6) does not apply. *See* Brief for Respondent Reporters Committee for Freedom of the Press, *et al.* in Opposition, 27 (Feb. 5, 1979).

This, however, ignores the nature of the intrusion. The notes contain far more than details about Dr. Kissinger's private life. They also reflect privately-held political views, opinions and beliefs on a variety of subjects, and information relating to Dr. Kissinger's associations with individuals and organizations. This is as true of conversations

in which government business was discussed as it is of purely private conversations. The notes were made and kept in the reasonable expectation that they were non-record materials which would not be part of any official file. The vice of the order is that it retroactively reclassifies the notes as "records" and requires that *all* of them, regardless of content, be read by Executive Branch employees to determine their FOIA status. Giving Dr. Kissinger an opportunity to object to public release of materials otherwise exempt from disclosure under 5 U.S.C. §552(b)(6) does nothing to eliminate the egregious violation of constitutionally protected privacy rights which the inspection process requires.

There is no precedent for this form of search order. The usual rule in civil cases is that a party need deliver only those documents "relevant in purpose" to the inquiry after his own review of the materials. *See v. City of Seattle*, 387 U.S. 541, 544-45 (1967); *In re Horowitz*, 482 F.2d 72, 78 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). Disputed documents must be reviewed by an impartial judicial officer, not Executive Branch employees.[33] Here, the court has ordered Dr. Kissinger to submit the contents of his private files to Executive Branch review in order to facilitate the private respondents' desire to read them. No court — other than the

[33]The requesters' reliance on *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), as justification for Executive Branch inspection of the notes is plainly misplaced. *Rose* actually confirms the general principle, ignored below, that *in camera* review by an impartial judicial officer — not Executive Branch employees — is required when constitutional privacy rights are at stake. That review must take place *before* the privacy invasion, not afterwards.

courts below — has ever intimated that such extraordinary procedures could be employed for so insubstantial a purpose.[34]

The District Court cited no authority to support the order. However, respondents argued below that this Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), could justify seizure and processing of the notes. If *Nixon* was, indeed, the inspiration for the order, we believe the District Court misapplied it.

The far more elaborate[35] procedures at issue in *Nixon* were prescribed by a special statute enacted as an emergency

[34]It is undisputed that the notes include purely personal conversations having no connection with government business. A. 245a; even the requesters concede that such documents cannot be records. *See* Brief for Respondents Reporters Committee for Freedom of the Press, *et al.* In Opposition, 25n.17. Once this concession is made, it follows that the order must be set aside because it contains no constitutionally acceptable method for separating out the privileged materials. The usual procedure is to permit the person claiming the privilege to make the separation, subject to *in camera* review by the court in the event his opponent disagrees with the result. That procedure works well when a clear standard exists for distinguishing privileged from non-privileged materials; here, however, the courts below articulated no standards for distinguishing "agency records" from "personal" and other "non-record" materials. The order thus cannot be reformed to eliminate its constitutional infirmities in the absence of a workable definition of "agency records." Although it may be possible to formulate a definition of "records" in the abstract, *see* 44 U.S.C. §3301, the reality is that agencies decide questions relating to the records status of particular documents on an *ad hoc* basis. We think this is what Congress expected, which is why we conclude elsewhere that FOIA should not be construed as a general charter for judicial review of agency recordkeeping determinations. *See* pp. 21-30, *supra*.

[35]*Compare* Pet. App. 59a-61a, *with* 44 U.S.C. §2107 *note*, §§102-105. *See also* 41 C.F.R. §§105-63.101-303 (procedures for processing the Nixon materials); 42 F.R. 63626-29 (Dec. 16, 1977) (proposed public access rules).

measure to preserve the former President's papers from the imminent threat of destruction. This Court held that the intrusion into privacy which the legislation made necessary did not for that reason invalidate it, but it did so only because archival inspection was the least intrusive means of protecting national interests of overriding importance. 433 U.S. at 451-54. There is no warrant whatever for the assumption that this Court's carefully qualified decision sustaining that legislation authorizes substituting a watered down version of the *Nixon* procedures for the usual rules applicable to claims of privilege in any and all proceedings involving public officials.

The rationale of *Nixon* has no application here. Here, the Government does not claim the documents. Here, no criminal laws are involved. And here, no provision has been made for the return of admittedly private and personal materials. There is no precedent or justification for seizing, searching and retaining any of the notes. The order entered below is supported neither by *Nixon* nor by any other judicial decision. It is unconstitutional and it should be set aside.

IV. THE NOTES MADE OF DR. KISSINGER'S TELEPHONE CONVERSATIONS WHEN HE WAS A PRESIDENTIAL ASSISTANT ARE NOT SUBJECT TO FOIA.

The MAP requesters did not sue for access to the notes made of Dr. Kissinger's telephone conversations when he was Assistant to the President for National Security Affairs because, as their counsel candidly advised the District Court, they recognized that FOIA could not apply to documents generated by Presidential Assistants. A. 266a. The RCFP requesters, cross-petitioners here, were less rigorous in their view of the law; they asked for *all* the notes — including those from the White House period — on the theory that all of them were State Department agency records. The District Court denied that claim, and the

Court of Appeals affirmed. The first and principal reason given for affirmance was that

> [t]he Freedom of Information Act does not extend to those of the President's advisors who are so close to him as to be within the White House rather than the Executive Office of the President (*see* 5 U.S.C. §552(e) (1976); S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 15 (1974); *Nixon v. Sampson*, 389 F.Supp. 107, 145-147 (D.D.C. 1975), *entry of order stayed*, 513 F.2d 430 (D.C. Cir. 1975); *cf. Soucie v. David*, 448 F.2d 1067, 1074-1076 (D.C. Cir. 1971).

Cross-petitioners do not dispute that statement; instead, they argue that

> documents which originated in the White House Office but were later circulated to other agencies in the routine course of government business without any effort by the President to exercise continuing control or maintain their confidentiality . . . should be treated like the records of any other federal agency to which FOIA applies. Cross-Petition in No. 78-1217 (hereafter "Cross-Petition"), 8 (Feb. 5, 1979).

It is unnecessary for this Court to consider whether cross-petitioners' theory is legally sound, because there is no basis for applying it in the circumstances of this case. The notes of Dr. Kissinger's White House conversations were *not* "circulated" to the State Department "in the routine course of government business," *id.*; the Department was *not* "free to use the notes as it saw fit," *id.* at 9; it *never* obtained

"custody" of the notes, *id.* at 10; and it *never* had "control over their use and disposition." *Id.* at 8.

The uncontroverted record evidence shows that when Dr. Kissinger was at the White House he treated the notes as personal papers and kept them in separate personal files; that when he moved to the State Department he relocated these same files to his new office and "continued to [maintain them] in separate personal files during my years at the Department." A. 247a. The record further shows that the notes were never circulated outside Dr. Kissinger's office, and that only he and his immediate aides had access to them. A. 245a-246a. The State Department did not "possess" or "control" these files any more than it would have possessed or controlled them had they been lodged in Dr. Kissinger's basement.[36]

The only connection between the White House notes and the State Department was the fact that these notes once were physically stored there in Dr. Kissinger's personal files. The Court of Appeals correctly concluded that

> [t]he mere relocation of these documents to the State Department *without any indication that they were used by that agency* does not render them State Department records obtainable via an FOIA request to

[36]Cross-petitioners suggest that the failure of the White House to assert continuing control over the notes shows it "surrendered" them to the State Department. Cross-Petition, 7-8, 9. We think the White House's lack of interest in the notes simply confirms Dr. Kissinger's testimony that these papers were "work aids which I could retain or discard as I chose." A. 245a. Moreover, as the opinion of the State Department's Legal Adviser makes clear, the Department did not itself attempt to exercise any control over the notes because it believed they were personal papers which it neither owned nor had the right to possess. A. 84a.

> that department. Pet. App. 50a (emphasis supplied).

Cross-petitioners cannot dispute this finding, for there is *no evidence whatever* that the White House period notes were used by the State Department at any time or for any purpose.[37]

Cross-petitioners also argue that some of the White House period notes might be records of the National Security Council, and that "the portions of the notes relating to Mr. Kissinger's NSC duties fell within the [State] Department's disclosure responsibilities under the FOIA. . . ." Cross-Petition, 13-14. There is no evidence that any of the notes are NSC records.[38] But even if it were assumed that this is the case, cross-petitioners' argument must fail.

First, the argument presupposes that the State Department was the "last agency with physical custody" of the notes. *Id.* at 3. This is not true. The State Department, as

[37]Cross-petitioners assert it is "logical to conclude" that the White House notes were used for a "variety of job-related purposes" after they were relocated to the State Department. Cross-Petition, 9. There is no evidence — none — to support this assertion. Since the sole use made of the notes was to keep Dr. Kissinger's appointment calendar current and to permit his Senior Special Assistant to keep abreast of his daily activities, A. 245a, the only "logical" inference is that the White House notes were not used for any purpose while they were stored at the State Department.

[38]Cross-petitioners speculate that some of the White House notes "necessarily relate to the affairs of the NSC" because of Dr. Kissinger's connection with the Council. Cross-Petition, 11. As Assistant to the President for National Security Affairs, Dr. Kissinger doubtless discussed the "affairs" of many agencies, but this does not mean the notes of such conversations can be characterized as the "records" of the agencies discussed. The Government Organization Manuals to which cross-petitioners refer always list Dr. Kissinger's position with the NSC as "Assistant to the President." A. 268a, 270a, 272a-74a, 276a. Again, there is no basis for inferring that the notes reflect conversations made in any other capacity.

such, had no access to, or custody or control over, any of the documents stored in Dr. Kissinger's personal files. If the White House notes contained NSC records, the last custodian was the NSC, not the State Department. Since the "mere relocation" of the notes did not "change their character," Pet. App. 50a, and cross-petitioners made no FOIA request to the NSC, the Court of Appeals correctly held that "[t]he speculation that some of these earlier transcripts concerned the affairs" of a non-party agency "adds nothing" to cross-petitioners' claim. *Id.*

Second, the NSC theory is inconsistent with the case cross-petitioners submitted for judgment in the District Court. Cross-petitioners' complaint did not allege that the White House notes were NSC records; it alleged that these notes reflected conversations "held by defendant Kissinger during his service as Assistant to the President for National Security Affairs." A. 22a; *see also* A. 29a-30a, 38a, 142a. Although Dr. Kissinger pointed out at the very beginning of the litigation that the papers of Presidential Assistants could not be subject to FOIA,[39] cross-petitioners never moved to amend their pleadings to allege that any of the White House notes were NSC records and never introduced any evidence to show that they were.

The theory of cross-petitioners' summary judgment motion was that the White House notes were State Department records, and that is the theory on which the District Court rendered judgment. The NSC alternative was not seriously advanced until *after* the District Court issued

[39]*See* Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, 2 *note* (May 2, 1977); Opposition to Plaintiffs' Motion for Summary Judgment and In Support of Defendant Henry A. Kissinger's Cross-Motion for Summary Judgment, 9-10 (June 17, 1977); Reply Memorandum by Defendant Kissinger In Support Of His Cross-Motion for Summary Judgment, 11-13 (Aug. 22, 1977).

its opinion denying cross-petitioners' claim.[40] Cross-petitioners' post decision efforts to change the theory of their motion were properly disregarded by the District Court, and just as properly rejected by the Court of Appeals as "speculation." Pet. App. 50a. There is no reason why this Court should disturb that conclusion.[41]

CONCLUSION

That Dr. Kissinger kept notes of his telephone conversations is not unusual; senior government officials have for decades followed the same practice. Nor is it unusual that the notes were kept in private files; materials of this type have always been treated by the State Department and by other agencies as personal papers which the authors could discard or retain at their discretion.

When Dr. Kissinger left office, he did not simply remove his private files and do with them as he pleased. Instead, he donated his personal papers — including the notes of his telephone conversations — and other documents relating to

[40]The NSC theory was not mentioned in plaintiffs' summary judgment motion and was only hinted at in their response to Dr. Kissinger's cross-motion for summary judgment. It was not seriously advanced until after the District Court issued its Opinion on December 8, 1977. *Compare* Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, 45-46 (Aug. 8, 1977) *with* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Clarification of Opinion, 3 (Dec. 16, 1977).

[41]As a consequence of cross-petitioners' failure to present the NSC theory in an orderly fashion, neither the District Court nor the Court of Appeals had any occasion to consider whether the NSC is an "agency" within the meaning of 5 U.S.C. §552(e). This question is important; it has never been considered by any court. This Court does not ordinarily consider legal issues not decided below. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 163-64.

his years in government to the Library of Congress so that the entire record of his public life would be collected in one place for the convenience of future scholars. The gift was unique in its scope and completeness. It was made openly, with the knowledge and approval of the State Department's principal administrative officers and in scrupulous compliance with its rules and policies.

The requesters candidly admitted below that their reason for instituting this lawsuit was to gain access to what they characterized as an "invaluable" collection of "background materials" on American foreign and domestic policy. That they want access to the notes is perhaps understandable, if short-sighted.[42] But the question here is whether FOIA supports their claim. We think it does not. FOIA applies to "agency records" — not to "background materials" or to personal papers.

The notes now belong to the United States by reason of Dr. Kissinger's voluntary gift to the Library of Congress.

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[42]The decision below, if sustained, is unlikely to enhance the long-range interests of history. As a prominent historian recently said:

> [s]ome of the republic's most precious historical sources have been the diaries . . . of cabinet ministers from Gideon Welles and Salmon P. Chase to Harold Ickes and Henry Wallace — diaries bearing on the discharge of official duties, written on government foolscap or dictated to government secretaries, often no doubt during working hours. The Smith standard, by making these invaluable documents the property of the state, not of the person who, beyond any official requirement, kept them, would thereby insure that they would never have been kept. . . . Surely, it would be better for historians to wait a few years and have this valuable collection than, by insisting on immediate access, discourage all Kissinger's successors from following his example.

Statement of Arthur Schlesinger, Jr., before the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations, 2-4 (March 2, 1978).

They will become publicly available when the privacy interests of Dr. Kissinger and those with whom he spoke no longer require protection, and when the whole historical record of Dr. Kissinger's time in government can be viewed dispassionately. That the notes may contain materials which respondents would like to read — or might profit by reading — provides no reason to twist the law or the Constitution.

The portion of the decision below which is adverse to Dr. Kissinger is wrong in law, wrong in policy, and wrong in result. We ask that it be reversed.

Respectfully submitted,

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In The Supreme Court of the United States

OCTOBER TERM, 1978

HENRY A. KISSINGER, PETITIONER

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PETITIONERS

v.

HENRY A. KISSINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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Miscellaneous (continued) Page

In The Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1088

HENRY A. KISSINGER, PETITIONER

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

No. 78-1217

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PETITIONERS

v.

HENRY A. KISSINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 49a-50a)[1] is not reported. The opinion of the district court (Pet. App. 51a-58a) is reported at 442 F. Supp. 383.

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[1] "Pet. App." refers to the separately bound appendix to the petition in No. 78-1088.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a–49a) was entered on November 7, 1978. The petition for a writ of certiorari in No. 78–1088 was filed on January 8, 1979, and the petition in No. 78–1217 was filed on February 5, 1979. The petitions were granted and the cases consolidated on April 16, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an agency "withholds" agency records in violation of the Freedom of Information Act, 5 U.S.C. 552, if it does not have custody of the records when a request for them is made and does not acquire or retrieve them in order to respond to the request.

2. Whether informal notes summarizing petitioner Kissinger's telephone conversations as Secretary of State—notes not in the Department of State's control—are "agency records" of the Department within the meaning of the Freedom of Information Act, 5 U.S.C. 552.

3. Whether informal notes summarizing Kissinger's telephone conversations as Assistant to the President for National Security Affairs became "agency records" of the Department of State when Kissinger took them with him on becoming Secretary of State.

4. Whether review of the notes for possible disclosure would violate Kissinger's constitutional expectation of privacy.

STATUTES INVOLVED

5 U.S.C. 552 provides in part:

> (a)(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> * * * * *
>
> (a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
>
> * * * * *
>
> (e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

44 U.S.C. 3101 provides:

> The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

44 U.S.C. 3102 provides:

> The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for
>
> (1) effective controls over the creation and over the maintenance and use of records in the conduct of current business;
>
> (2) cooperation with the Administrator of General Services in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value; and
>
> (3) compliance with sections 2101-2113, 2501-2507, 2701, 2901-2909, and 3101-3107, of this title and the regulations issued under them.

44 U.S.C. 3106 provides:

> The head of each Federal agency shall notify the Administrator of General Services of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Administrator shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody.

44 U.S.C. 3301 provides:

> As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

STATEMENT

A. The Notes

From January 20, 1969, until September 22, 1973, petitioner Henry A. Kissinger served as Assistant to the President for National Security Affairs (A. 244a). From September 22, 1973, until November 3, 1975, he served both as Assistant to the President for National Security Affairs and as Secretary of State (*ibid.*). From

November 4, 1975, until January 20, 1977, he served as Secretary of State (*ibid.*). During Kissinger's period of government service, his secretaries generally monitored his telephone conversations and took shorthand notes of what was said; they prepared summaries which, in some cases, were substantially verbatim transcripts (*ibid.*)[2] Conversations so monitored covered official business, private matters, and shades of each (A. 245a).[3]

Kissinger had no regular practice of editing the notes for accuracy (*ibid.*).[4] They were used by his executive

[2] In some cases the conversations were taped and the summaries made later from the tapes (A. 153a). In no cases were the original stenographic notes, or any tapes, retained after the transcription (A. 153a, 244a). For convenience we refer to the summaries, which were retained, as "notes."

[3] The record includes no example of the notes other than the following excerpts from summaries in 1969 concerning "leaks" (A. 148a–149a):

Date	*Partial Transcription*
February 3, 1969	"K and [A] discussed press leaks."
February 19, 1969	"K said this was probably unnecessary call but President is very anxious that there be no leaks of any sort about trend of the discussion today. [B] said he would say nothing."
March 18, 1969	"HAK said the President's first concern was if the things we are trying to do leaked, it would lose its effectiveness."

[4] There is a factual dispute concerning whether Kissinger edited at least *some* of the notes for accuracy. Plaintiff William A. Safire contends that Kissinger did edit at least some of the notes (A. 175a). Kissinger, however, states that he "did not edit them as they were prepared or at any other time" (A. 191a–192a). Kissinger's statement that he had no *regular* practice of editing the notes for accuracy seems undisputed.

secretary to prepare his appointments schedule and were read by his immediate staff to keep abreast of Kissinger's activities and to follow up on matters discussed. This avoided the need for Kissinger to repeat to aides and staff the substance of his many phone conversations (A. 245a). The notes were not circulated beyond his immediate personal staff (A. 246a). They were filed in Kissinger's office in personal rather than official files (A. 245a).

B. The Deeds

1. On November 12, 1976, petitioner Kissinger deeded to the United States, in care of the Library of Congress, a large collection of papers relating to his career (A. 42a–45a). This collection did not include the telephone notes, but it included both personal materials collected during Kissinger's years at Harvard University and the contents of personal files he had accumulated in government. Employees of the Department of State reviewed the copies of official documents contained in this collection and retained (a) original or record copies of documents belonging to the agency, and (b) any materials containing classified information (A. 251a–253a).

By a second deed dated December 24, 1976, Kissinger transferred to the United States ownership of the telephone notes, subject to certain restrictions on access (A. 45a–46a).[5] On December 28, 1976, the notes

[5] Public access will be permitted 25 years after the transfer or five years after Kissinger's death, whichever is later, unless one of the parties to the conversation is still living, in which case the summary shall become available only with that party's consent (A. 45a–46a). In the interim, Kissinger (and anyone who receives his approval) may review the materials (*ibid.*).

were delivered to the Library of Congress (A. 249a).[6] The deeds and the documents were accepted by Daniel J. Boorstin, Librarian of Congress (A. 45a, 46a).

2. On at least two occasions in 1976, Monroe Leigh, the Legal Adviser of the Department of State, advised Kissinger that the telephone summaries were not agency records but were his personal materials which he would be free to take when he left office (A. 80a, 258a-259a). The Legal Adviser based this conclusion on, among other things, the fact that Kissinger consistently had filed the materials in his personal files, had not circulated the summaries beyond his personal staff, and had not been required by statute or departmental regulations to create the summaries. The Legal Adviser also concluded that the Department's record-keeping needs could be met by the preparation of extracts of the information contained in the notes that pertained to official business (A. 81a-84a). After the transfer of the notes to the Library of Congress, Kissinger authorized a State Department official to review them and to prepare such extracts (A. 248a). The extracts, once made, were filed with the State Department and the National Security Council (A. 248a).

C. The FOIA Requests

On January 12, 1976, several months before the gifts were made, Kissinger filed answers to interrogatories

[6] Kissinger removed all of the existing notes from his office to a vault in New York on October 29, 1976 (A. 248a). Kissinger states that his secretaries "generally monitored" telephone calls "during the period of his government service," which ended on January 20, 1977 (A. 244a). Therefore, the record suggests that after the removal of existing notes to the vault on October 29, 1976, Kissinger's secretaries continued to make notes. All summaries in existence were delivered to the Library of Congress on December 28, 1976 (A. 248a-249a).

in a suit involving alleged wiretapping of federal employees and journalists, who had been suspected of disclosing confidential information (A. 148a). In response to interrogatories requesting identification of records of telephone conversations made during a period before Kissinger became Secretary of State, he described the monitoring and note-making procedure we have recounted (A. 149a).[7]

On January 14, 1976, William Safire, a columnist employed by the *New York Times*, requested the Department of State to produce, under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, any transcripts referred to in the interrogatory answer concerning (a) any conversation in which Safire's name appeared or (b) any conversation with designated persons in which the subjects of "leaks" of information was discussed (A. 49a-51a). By letter of February 11, 1976, the Department of State denied the request on the ground, among others, that the notes had been made while Kissinger was National Security Adviser and therefore were not agency records (A. 168a-170a). By letter of February 24, 1976, Safire appealed this decision to the Assistant Secretary of State for Public Affairs (A. 52a-55a). Safire acknowledged that the notes had been made at the White House, but he insisted that they were State Department records by virtue of their relocation to the State Department (A. 52a-53a). The appeal was denied by letter of March 29, 1976, stating, among other things, that "documents which are originated in a White House office by a member of the

[7] The period referred to in the interrogatory and answer was January 21, 1969, through February 12, 1971 (A. 149a). Kissinger did not become Secretary of State until September 22, 1973 (A. 244a).

President's immediate staff * * * are not subject to the Act" (A. 171a–173a). No further action was taken by Safire until almost a year later, when he and others filed one of the two suits involved in this case.

On November 11, 1976, the *Washington Post* printed an interview with Lawrence Eagleburger, Deputy Undersecretary of State, in which Eagleburger reportedly stated that Kissinger might take "secretarial notes of his telephone conversations" with him when he left his post (A. 86a). Eagleburger, it was reported, also stated that the Legal Adviser had told Kissinger that the notes were personal papers rather than agency records (*ibid.*).

On December 28, 1976, Kissinger released an announcement of his gift of the notes to the United States and their placement in the Library of Congress (A. 167a). On the same day, the Military Audit Project, and its director (referred to collectively as "MAP") filed an FOIA request with the Department of State, seeking all records of conversations between Kissinger as Secretary of State, and foreign heads of state, ambassadors, foreign ministers and national security advisers (A. 17a–18a, 69–70a). On December 29 MAP made a second FOIA request, this time seeking conversations of the Secretary of State with anyone (A. 17a, 71a–72a). MAP did not request telephone notes made while Kissinger was National Security Adviser. On January 18, 1977, the Legal Adviser of the Department of State denied the requests because the notes were not agency records and, in any event, had been deposited with the Library of Congress prior to the requests and thus no longer were within the custody or control of the Department of State (A. 73a). The denial was affirmed on administrative appeal (A. 78a–79a).

On January 13, 1977, the Reporters Committee for Freedom of the Press (RCFP), the American Historical Association, the American Political Science Association, and a number of other journalists (collectively referred to as "the RCFP requesters") submitted an FOIA request to the Department of State seeking "all transcribed secretarial notes of telephone conversations held by Henry Kissinger during his government service as Assistant to the President for National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State" (A. 56a–59a).[8] On January 28, 1977, the request was denied on the grounds that the materials sought were not agency records and, in any event, were no longer in the Department's custody and control (A. 61a–63a).[9] The Department advised the RCFP requesters that they need not pursue an administrative appeal inasmuch as the materials sought were not agency records (A. 63a).

D. The Archivist's Request Under The Records Disposal Act of 1943 and the Federal Records Act of 1950

The Records Disposal Act of 1943, 44 U.S.C. 3301–3324, prohibits alienation or disposal of "records" with-

[8]The request also sought "all other * * * materials that reflect, verbatim or substantially verbatim, the contents of the conversations, telephonic or otherwise, held by Henry Kissinger" (A. 56a–57a). This portion of the request, insofar as it sought materials other than the secretarial notes, was denied by the Department on the ground that it was too broad and did not describe with reasonable particularity the documents requested (A. 62a). See 5 U.S.C. 552(a)(3). Later, however, the State Department withdrew its objection and processed this part of the request (see MAP Br. in Opp. 2 n.1).

[9]The Department's denial observed that the extracts based on the notes were agency records but that the agency understood the request to comprehend only the original notes, not the extracts (A. 62a).

out the approval of the Administrator of General Services. 44 U.S.C. 3303–3304. The Administrator's authority under this and related records-management provisions has been delegated to the Archivist of the United States. See GSA, Delegations of Authority Manual ADM P 5450.39A.

On January 4, 1977, the Archivist, James B. Rhoads, wrote to Kissinger, requesting that he be permitted to inspect the secretarial notes so that he could determine whether they were personal property rather than agency records and whether they were materials described by Section 101(b) of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107 note (A. 47a–48a). The Legal Adviser analyzed the request and issued a detailed memorandum dated January 14, 1977, which concluded that, under the Federal Records Act of 1950, 44 U.S.C. 2901–2909, 3101–3107, each agency has the responsibility to create and maintain records that effectively record essential agency actions, but that agencies enjoy reasonable discretion in determining precisely how this responsibility should be discharged. The Department's regulations did not require retention of the notes as agency records, the Legal Adviser concluded, so long as extracts of the official business contained discussed in the notes were filed as agency records (A. 92a–98a). He also concluded that the inspection procedure suggested by the Archivist would compromise the Department's policy of respecting the privacy of such secretarial notes and would discourage the creation of such historical materials in the first place (A. 96–97).

On January 18, 1977, Kissinger himself replied to the Archivist (A. 88a). Kissinger stated that there had been some misunderstanding about the nature of the gift and

enclosed a copy of the second deed. With respect to the request to inspect, the letter enclosed and referred the Archivist to the Legal Adviser's memorandum, "which discuss[ed] several problem areas that might arise if the additional procedures contemplated in your letter were followed" (A. 88a).

On February 11, 1977, the Archivist renewed his request for an inspection and enclosed a law memorandum of the General Counsel of GSA concluding that the materials in question might well be records rather than personal files and that the Archivist was entitled to inspect them (A. 99a–100a). Eventually, a limited inspection was conducted by the Archivist's staff (see J.A. 274–279), but no definitive resolution of the issue among Kissinger, the Department of State, and the Archivist was reached by the time the district court issued its decision.[10]

E. The District Court's Decision

On February 8, 1977, the RCFP requesters and Safire commenced an action in the United States District Court for the District of Columbia. They asked the court to compel disclosure of the notes Kissinger made as National Security Adviser and as Secretary of State (A. 1a, 22a–41a). On March 8, 1977, MAP filed a similar suit limited to the latter notes (A. 17a–20a). Both suits named Kissinger, the Librarian of Congress, the Secretary of State and the Department of State as defendants. The Archivist was named as a defendant in the second suit (A. 17a–18a). Plaintiffs sought a judgment declaring that the summaries are agency records of the Department of State, not personal papers, an order re-

[10] "J.A." refers to the joint appendix in the court of appeals.

quiring the Library of Congress to return them to the Department, and an order requiring disclosure to plaintiffs of all of the summaries save those exempt under the FOIA (A. 20a, 40a–41a). The cases were consolidated on June 20, 1977 (A. 3).

Plaintiffs moved for summary judgment, and Kissinger cross-moved for summary judgment (A. 64a–68a, 193a–198a).[11] The court granted plaintiffs' request in substantial measure. It first held that the State Department's rules required Kissinger to create the notes (Pet. App. 56a). Regulations required State Department employees to prepare adequate records of, among other things, all "[d]ecisions, commitments, and discussions of any significance which are oral in nature" in order "to provide materials for research and historical purposes." 5 Foreign Affairs Manual [FAM] 423.1–423.2. All conversations of the Secretary of State, the court said, are "significant" within the meaning of these regulations.

The court also concluded that the notes fit the definition of a "record" under the Records Disposal Act and

[11] The federal parties initially opposed the summary-judgment motion filed by plaintiffs on the ground that, after the suit had been filed, no representatives of any of the federal defendants had been permitted to review the notes, and that they therefore were unable to determine whether any federal defendants would seek custody of the materials (J.A. 190–198). Such an inspection was necesssary, it was urged, to determine whether any of the federal defendants would file a cross claim under Fed. R. Civ. P. 13 for return for the materials (J.A. 198). The federal parties simultaneously filed a request for production of the documents, under a protective order to preserve confidentiality, pursuant to Rules 26 and 34. An agreement was eventually reached between the federal defendants and Kissinger under which an inspection of the notes was permitted. The federal defendants then withdrew their opposition to the consideration of the pending summary-judgment motions (J.A. 274–279).

the Federal Records Act because they are "documentary materials * * * made or received by an agency * * * under Federal law or in connection with the transaction of public business and preserved or *appropriate for preservation as evidence of the* organization, functions, *policies*, *decisions*, procedures, operations, or other activities of the *Government* or because of the informational value of data in them" (Pet. App. 54a, citing 44 U.S.C. 2901(1), 3301; emphasis by the court). Invoking principles of property and copyright law, the court reasoned that the summaries are the property of the United States because they were prepared on government time and with the aid of department employees, equipment, materials and other public resources, and as part of Kissinger's official duties. Under these circumstances, the court held, the notes are "agency records," not personal property.

Second, the court held that agency records may be destroyed or alienated only with the prior approval of the Administrator of General Services. One remedy for a breach of this procedure, the court noted, is for the agency, through the Attorney General, to initiate an action for recovery of the missing records (Pet. App. 54a–55a). Although Kissinger argued that there is no private remedy for any violation of the records acts, the court did not consider this argument. It held, instead, that it could use "the broad equitable powers granted the district courts [by 5 U.S.C. 552(a) (4)(B)] in aid of their role as the 'enforcement arm' of the Freedom of Information Act * * * to order the return of wrongfully removed agency documents where a statutory retrieval action appears unlikely" (Pet. App. 55a). Although the court never held that a retrieval action should have been brought, it ordered that the documents be re-

turned to the Department of State, and it ordered the Department of State to determine which of the summaries are exempt from disclosure under the FOIA and to advise Kissinger of its determination. The court invited Kissinger to move the court for a protective order prohibiting disclosure of any materials exempt under 5 U.S.C. 552(b)(6).[12] Subject to this procedure the State Department was ordered to make the required summaries available to plaintiffs.[13]

F. The Court of Appeals' Decision

All of the private parties appealed.[14] With respect to Kissinger's objections to the judgment, the court of appeals endorsed the district court's opinion without discussion (Pet. App. 49a).[15]. With respect to the summaries made during Kissinger's tenure as National Security Adviser, the court of appeals held that their production was not required by the FOIA. It reasoned: First, FOIA applies to "agencies," and, although the "Executive Office of the President" is an "agency" (see 5 U.S.C. 552(e)), the President's National Security Adviser is not. Second, the relocation of these notes to the State Department without use by that agency did not render them agency records of the State Department. Third, even if the notes concerned the National Security Council, which is an "agency" under the FOIA, no request was made to the National Security Council (Pet. App. 49a–50a).

[12] If the court is right in holding that the notes must be processed for release under the FOIA, it is clearly wrong in holding that the agency may be forbidden to disclose documents that it desires to disclose. See *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), slip op. 6–10. No party has presented this question, however, for resolution by the Court.

[13] The court observed that plaintiffs had withdrawn their request for summaries made during Kissinger's tenure as National Security Adviser (Pet. App. 55a). Actually, however, no such withdrawal was made. At oral argument before the district court on September 28, 1977, counsel for MAP stated that his clients sought only the notes made while Kissinger was Secretary of State (A. 266a). But MAP had never requested the notes made while Kissinger was National Security Adviser. The RCFP requesters had made such a request and did not surrender it at the hearing. The court evidently mistakenly believed that MAP had requested the earlier notes and then withdrew the request. The court of appeals considered the issue on the merits.

[14] The four federal defendants—the Secretary of State, the Department of State, the Librarian of Congress, and the Archivist of the United States—did not appeal. They appeared in the court of appeals as appellees but did not file a brief. Instead, the United States filed a brief as amicus curiae, arguing that the district court erred in ordering the return of the documents in what amounted to a private action to enforce the Federal Records Act, without finding that they had been removed in anticipation of, or to defeat, an action under the FOIA.

The four federal defendants appear in this Court as respondents under this Court's Rule 21(4). Although the federal parties did not participate actively in the court of appeals in their own names, that is not a bar to their urging here that the court of appeals' judgment should be reversed in part. The Court has jurisdiction to adjudicate the full case and to answer the questions presented in the petitions. Whether it receives the views of the federal parties on these questions as parties or as amici curiae is of little consequence.

[15] The court of appeals refused to stay the district court's order pending appeal. On April 24, 1978, this Court stayed the order pending final disposition of the appeals. 435 U.S. 993. Although the court of appeals' order affirming the judgment has not been stayed, retrieval and processing have been postponed pending this Court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

The disputed telephone notes are in the possession of the Library of Congress. They are the property of the

United States, Kissinger having surrendered whatever interest he had. The Library of Congress desires to keep the notes; the State Department, so far as this record discloses, does not want them back. The Freedom of Information Act does not require a court to order the notes transferred from an institution that wants them to an institution that does not.

The Act requires "agencies" to make nonexempt "records" available on request. 5 U.S.C. 552(a)(3). The Act authorizes the district courts to enjoin an "agency" from "withholding agency records" and to order the production of any "agency records improperly withheld" from the complainant. 5 U.S.C. 552 (a)(4)(B). The State Department is an "agency;" the Library of Congress is not. When the plaintiffs sought the documents, the State Department did not have them. It could not comply with the requests, because it had neither possession nor control. It is therefore hard to see how the State Department "withheld" the notes in violation of the Act. Since the State Department *did* not violate the FOIA, and the Library of Congress *could* not violate the FOIA, there was no occasion for judicial relief.

I

Relief is authorized by the FOIA only when the agency to which the request is made "withholds" the requested materials. 5 U.S.C. 552(a)(4)(B). An agency "withholds" documents in violation of the Act when it refuses to produce requested, nonexempt documents in its custody. Once such withholding occurs, the district courts may employ broad equitable remedies to carry out the Act's commands. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 18–20 (1974). If the agency

gives the documents away and loses custody after "withholding" them, for example, a court could order retrieval and production in accordance with the FOIA. If the agency loses custody before the request is made, however, there is no withholding because the agency's lack of possession is a complete answer to the FOIA request. Because there is no violation of the Act, the court is not authorized to provide any remedy.

In the present case, the State Department did not have possession of the notes at the time the requests were made. On October 29, 1976, the notes were removed to a vault in New York. On December 24, 1976, the notes were transferred to the Library of Congress. Only thereafter did MAP and the RCFP requesters seek the notes under the FOIA. The State Department did not "withhold" the documents because it did not have them. Because there was no withholding there was no occasion for the district court to invoke its broad remedial powers.

The district court did not explicitly find any withholding by the agency of the notes. The court's rationale evidently was that the State Department should have retained the notes, and that the court therefore could restore them to the agency so that they would be available for FOIA inspection. The FOIA, however, does not require retention of any particular records. To the contrary, the Records Disposal Act of 1943, 44 U.S.C. 3301–3314, the Federal Records Act of 1950, 44 U.S.C. 2901–2909, 3101–3107, and records-management programs established by federal agencies permit, and sometimes require, the disposal of millions of agency records annually. In the absence of a pending request, nothing in the FOIA interferes with agency decisions to retain or to dispose of agency records.

The district court's conclusion that the State Department should have retained the notes thus must rest on an interpretation of the Records Disposal Act of 1943, the Federal Records Act of 1950, or the agency's records management program. But even if the notes were "records" under these provisions, and the notes were improperly removed, the sole remedy authorized by Congress is an action by the Attorney General to retrieve the records under 44 U.S.C. 3106. There is no statutory private right of action to enforce an agency's duties under these Acts, and there is no reason for the courts to create such a remedy. The duties with respect to records are intended to benefit only the government in general and the public at large, not any special class of persons; there is no indication of any legislative intent to create a private remedy, and implication of such a remedy would tend to frustrate the scheme of the records acts. *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979), slip op. 9; *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 10-15; *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), slip op. 32-33; *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Therefore, even if the notes are records that should have been retained by the agency, the district court was not authorized to order their return at the behest of a private plaintiff. Our conclusion that neither the FOIA nor the records acts authorize the relief granted here, if correct, is dispositive of the entire case.

II

The FOIA requires production of "records" and "agency records," which it apparently treats as synonyms. The courts in this case apparently equated

these terms with "record" as used in the Records Disposal Act and the Federal Records Act, which is (44 U.S.C. 2901, 3301):

> all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them.

The courts held that the telephone notes are records within the meaning of this definition. We agree with the courts below that the FOIA applies to at least all records within the meaning of 44 U.S.C. 3301. If, contrary to our primary submission, the Court holds that a district court, in an FOIA suit, may order an agency to retrieve documents that are "records" under the Federal Records Act of 1950, in order to satisfy an FOIA request, it will be necessary to consider whether the notes are "records" within the meaning of 44 U.S.C. 3301.

Within the limitations set by the Federal Records Act, each agency is required to establish a records management program that defines "record" and "nonrecord" materials for the purposes of the agency. The agency must strike an appropriate balance between preserving documentation sufficient to record the actions of the agency and minimizing size of federal files. 44 U.S.C. 2902, 3101, 3102. Once designated as a "rec-

ord," a document may not be alienated or destroyed without the consent of the Administrator of General Services. 44 U.S.C. 3314. "Nonrecord" materials, however, may be relinquished without approval of the Administrator. 41 C.F.R. 101-11.401-3(d). The scheme of the records acts thus comprehends three categories of documents: (a) "records," which must be retained by the agency and which can only be alienated or destroyed with the consent of the Administrator of General Services; (b) "nonrecord" materials, such as preliminary notes, which an agency may choose to discard when their usefulness ends, and (c) "personal" documents of employees. The first two categories are the property of the United States. All documents in the first category are "agency records" under the FOIA and at least some, if not all, documents in the second category are. The last category belongs to the individual employee or official and is subject to neither FOIA disclosure nor the records act.

In the present case, Kissinger contends that the telephone notes fall into the category of personal materials. We disagree. The notes were made in the course of Kissinger's official duties for the purpose of recording agency business and assisting him and other government employees in discharging their official responsibilities; they were thus the property of the United States. But the State Department's authority to manage and dispose of unneeded documents allows it to permit employees to retain nonrecord, unclassified materials rather than destroy them. If an employee, acting in an authorized way, retains nonrecord materials, they become the property of the employee, even if the information in them does not.

The traditional point for relinquishing nonrecord materials to officials and employees is on their departure from the agency. An agency has the authority to relinquish the materials prior to the official's departure, but, in this case, even if the notes were nonrecord materials, the State Department's records management regulations required Kissinger to maintain the notes concerning agency business in a working file belonging to the agency—separate from his personal files—until their usefulness to the agency was at an end. Kissinger's notes continued to be useful in the preparation of extracts of significant discussions until his departure. The notes pertaining to agency business, therefore, belonged to the agency throughout Kissinger's tenure as Secretary of State.

Whether the notes at issue in this case were "record" materials or "nonrecord" materials, however, depends on (i) the extent to which the Federal Records Act and the Records Disposal Act permit the State Department to classify them as nonrecord materials, and (ii) whether the records management program of the State Department in fact classified the notes as records or nonrecord materials. The Legal Adviser of the State Department concluded that statutes and the agency's record management regulations permitted the agency not to treat the notes as record materials so long as extracts were made of the business portion of the notes for the permanent files. The Archivist of the United States disagrees. It is very difficult to resolve this issue on this record. Neither the notes nor the extracts are before the Court. It is impossible to judge the extent to which the extracts adequately documented the agency business in the notes without actually comparing the

extracts with the notes. Although we set forth the considerations that might guide a resolution of these issues, we conclude that these issues should not now be resolved.

III

If the Court agrees with our argument in Part I, it follows directly that petitioners in No. 78–1217 are no more entitled to the notes made before Kissinger became Secretary of State than they are entitled to the notes made while he was Secretary of State. The notes were not generated at the State Department. They were merely materials, such as personal books, diaries, and private correspondence, that Kissinger took with him when he left the White House. The fortuity that he happened to keep them at his office at the State Department did not place them in the custody and control of the State Department. The State Department could not "withhold" what it did not possess.

But even if the Court rejects our argument in Part I, petitioners are not entitled to the notes made by Kissinger at the White House. Petitioners concede (78–1217 Pet. 6–7) that they are not entitled to any notes that pertain to Kissinger's activities other than those that "relate to the affairs of the National Security Council" (78–1217 Pet. 11). They contend that the National Security Council is an "agency" under FOIA. Even so, relief should be denied. First, Kissinger was not an employee or official of the NSC. His notes that "related to" activities of the NSC were thus no more NSC records than his notes, if any, relating to the Department of Agriculture were that agency's records. Second, a document that simply passes through an agency, a document created elsewhere and not reflecting on the agency's performance, is not an "agency record." Here, the notes were never transferred by the NSC to the State Department for its use. All that happened was that Kissinger, by chance, happened to keep the notes at his office at the State Department rather than elsewhere. Third, the RCFP requesters never sought the documents from the NSC. If the NSC is an agency under the FOIA, then surely the requesters should have made a request of the agency whose records the notes allegedly were rather than of the State Department, which was essentially a stranger to them.

IV

If the Court disagrees with our arguments and holds that any portion of the notes is subject to FOIA disclosure, then it should reject Kissinger's argument that processing of the notes would violate his constitutional right of privacy. This argument is foreclosed by *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455–465 (1977), which held that the screening of tapes made in the Oval Office for possible release, and the review of all written materials by the Administrator, did not violate President Nixon's constitutional interests. Kissinger's position is no stronger than Nixon's. Like the Nixon materials, the Kissinger notes were made in the course of discharging his official responsibilities. Indeed, unlike Nixon, Kissinger prepared the notes for the purpose of sharing them with other employees of the State Department. It may be that the notes indiscriminately commingle purely personal matters with official matters. That, however, was the result of Kissinger's instructions that the notes be made indiscriminately. If the Court holds that the statutory goals of the FOIA or the records acts require that the notes be returned to the State Department, those goals

may not be defeated by Kissinger's decision to mix private affairs with public business.

ARGUMENT

I

NEITHER THE FOIA NOR THE FEDERAL RECORDS ACT AUTHORIZES AN ORDER TO RETRIEVE RECORDS RELINQUISHED BY AN AGENCY PRIOR TO ANY FOIA REQUEST TO INSPECT THEM

The remarkable thing about the district court's opinion (which was adopted by the court of appeals) is that it awarded extraordinary equitable relief under the FOIA without ever finding that a violation of the FOIA had occurred. The court apparently found that the Federal Records Act of 1950 (or State Department regulations) had been violated by an improper removal of the notes. It then invoked its equitable jurisdiction under the FOIA to restore the notes to the agency for disclosure under FOIA. This holding necessarily means that anyone may sue an agency and compel it to retrieve records removed in violation of the agency's records-management rules; it supplies, in effect if not in design, a private right of action to enforce the records act. This holding cannot be reconciled with the fact that (a) neither the Federal Records Act of 1950 nor the Records Disposal Act of 1943 creates a private remedy to enforce agency record-keeping obligations and (b) nothing in FOIA or its legislative history purports to supply such a private remedy.

A. *Neither the Federal Records Act Nor The Records Disposal Act Creates a Private Remedy To Enforce Agency Record-Keeping Obligations*

Once a document achieves the status of a "record" under the Records Disposal Act, 44 U.S.C. 3301-3309,

it may not be alienated or disposed of without the consent of the Administrator of General Services, who has delegated his authority in such matters to the Archivist of the United States. 44 U.S.C. 3303-3303a, 3308-3314; GSA, Delegations of Authority Manual ADM P 5450.39A.[16] A "record" includes any document (i) "made or received by an agency under Federal law or in connection with the transaction of public business" and (ii) "preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them." 44 U.S.C. 3301.

This definition makes a document's status as a "record" depend on the circumstances of the particular agency involved. What is "appropriate for preservation" by one agency may be waste paper for another. It is understandable, therefore, that the Federal Records Act of 1950, 44 U.S.C. 2901 *et seq.*, authorizes the "head of each Federal agency" to establish a "records management program" to define the extent to which documents are "appropriate for preservation" as agency records. Such a program must, on the one hand, assure

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[16] This does not mean, however, that the Archivist must inspect each document before it is disposed of. Agencies may submit to the Archivist lists of categories of records proposed to be disposed of after specified retention periods. 44 U.S.C. 3303 (2). Once the Archivist approves the category and the retention period, documents within the category may be disposed of without further approval by the Archivist. The State Department, for example, has collected all such approved categories in Appendices A and B to the U.S. Department of State, *Records Management Handbook* (1977). The retention periods for the numerous categories of documents range from a few months to permanent retention.

"adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency," 44 U.S.C. 3101, and, on the other hand, "prevent the creation of unnecessary records." 44 U.S.C. 2902(3). Within these limits, the agency head must determine the proper balance for the record keeping needs of the agency and must determine the extent to which rough notes and work aids should be retained as agency records. Those that the agency requires to be retained become "records" under the Act, and those not required to be retained are called "nonrecord materials." See 41 C.F.R. 101-11-401.3.d[17]

[17]The agency also must "cooperate" in applying the guidelines for records management promulgated by the Administrator of General Services, who is required by the Federal Records Act to assist agencies in achieving the purposes of the Act. See 44 U.S.C. 2904(2) and 3102(2). The Administrator is directed to "provide guidance and assistance to Federal agencies with respect to records creation, records maintenance and use, and records disposition." The Administrator has the responsibility to "promulgate standards, procedures, and guidelines with respect to records management and record management studies," to "conduct research with respect to the improvement of records management practices and programs," to "serve as a clearinghouse for information with respect to records management and as a central source for reference and training materials with respect to records management," to direct the continuing attention of Federal agencies and the Congress on the burden placed on the Federal Government by unnecesarry paperwork, and on the need for adequate policies governing records creation, maintenance and use, and disposition * * * ." 44 U.S.C. 2904. The Administrator may inspect the records of records management practices of any agency for the purpose of making recommendations for improvement. 44 U.S.C. 2906. The agency's records program must provide for "cooperation with the Administrator of General Services in applying standards, procedures, and techniques designed to improve the management of records," 44 U.S.C. 3102(2), and it must comply with "sections 2101-2113, 2501-2507, 2701, 2901-2909, and 3101-3107, of this title and the regulations issued under them."

The Federal Records Act establishes only one remedy for the improper removal of a "record" from the agency. 44 U.S.C. 3106 requires the head of the agency to notify the Attorney General if he determines or "has reason to believe" that records have been improperly removed from the agency; it authorizes the Attorney General, "with the assistance of the Administrator," to bring suit to recover the records. Nothing in the Act authorizes a private party to bring a retrieval suit, and nothing authorizes a private suit to compel the Attorney General to bring suit.[18]

No such private remedy should be implied. The question whether there should be such a remedy is entirely

[18]There has been no attempt to compel the Attorney General to bring suit. Compare *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), with *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975). The refusal of an agency to commence proceedings to retrieve documents ordinarily would be an unreviewable act of prosecutorial discretion. See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78-575 (June 11, 1979); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *FTC* v. *Universal-Rundle Corp.*, 387 *U.S.* 244 *(1967); Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *FTC* v. *Klesner*, 280 U.S. 19, 25 (1929). 44 U.S.C. 3106, however, states that the head of the agency "shall" attempt to recover documents through the Attorney General where he "has reason to believe" agency records have been "unlawfully removed." Arguably, therefore, the decision of the agency head (although not the decision of the Attorney General) is subject to review under the Administrative Procedure Act, 5 U.S.C. 701-706. We do not discuss this question in light of the failure of any party to seek APA review. Even if judicial review is unavailable, however, it hardly means that an agency's failure to retreieve "records" pursuant to 44 U.S.C. 3106 escapes review. The Administrator is authorized to inspect agency records management practices and to request agency heads to bring such retrieval actions. 44 U.S.C. 2905-2906. If encouragement fails, the Administrator may report the agency to Congress. See 44 U.S.C. 3303a(f). Congress or the President may inquire into whether the agency head justifiably declines to retrieve documents alleged to be records under the Federal Records Act.

one of statutory construction. And in answering that kind of question, the Court has considered four factors: (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member; (2) whether there is any indication of legislative intent to create a private remedy; (3) whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the states. *Cort* v. *Ash*, *supra*, 422 U.S. at 78; *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979), slip op. 9. The first three factors—the factors "traditionally relied upon in determining legislative intent"[19]—preclude any implied remedy in this case.

First, there is no "class for whose *especial* benefit the statute was enacted." *Cort* v. *Ash*, *supra*, 422 U.S. at 78 (emphasis in original). The Federal Records Act was enacted to facilitate the internal management of the government, or as the Senate Report put it, the "administrative and executive" needs of the agency:

> It is well to emphasize that records come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them. There is danger of this simple, self-evident fact being lost for lack of emphasis. The measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization.

S. Rep. No. 2140, 81st Cong., 2d Sess. 4 (1950) (FRA Senate Report). There is no suggestion in the Act or its legislative history that Congress imposed record keeping obligations on agencies for the purpose of benefitting particular members of the public who desired to inspect them. It may be that the public as a whole benefits from adequate recordkeeping, but that kind of benefit does not run to a special class and thus does not support an implied private right of action. See *Cannon* v. *University of Chicago*, *supra*, slip op. 11 n. 13 (the nature of the right or duty is the most important indicator). No part of the statute creates personal rights that any agency make or keep particular records. The structure of the statute is inconsistent with any such right. No agency needs to create any particular record; in particular, nothing required Kissinger to create the notes.[20]

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[19] *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 15. The fourth factor has no application in this case. It concerns whether a private federal remedy may interfere with a state's regulation of a concern of the state. Federal records management is exclusively a concern of the federal government, and accommodating federal remedies with state concerns is therefore unnecessary.

[20] The district court stated (Pet. App. 56a) that a State Department regulation required Secretary Kissinger's staff to listen to his conversations and make notes. The Legal Adviser of the Department of State concluded, to the contrary, that the regulation did not require the creation of the notes (A. 83a). The district court gave no reason for holding that the Legal Adviser's opinion is wrong; certainly the Legal Adviser's opinion "is not plainly inconsistent with the wording of the regulations* * *." *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977). See note 34, *infra*. The district court therefore erred in rejecting the State Department's construction of its regulation. But even if the court were right, however, and the regulation required the creation of the notes, it would not follow that the regulation also required their retention after adequate extracts had been prepared.

And records, once created, can be destroyed with the Archivist's approval. It must follow that no one's personal rights were violated by the fact that the State Department did not keep Kissinger's notes. And without a violation of personal rights, there is no justification for the implication of a private right of action to compel acquisition or retrieval of particular records.[21]

Second, there is no legislative intent, explicit or implicit, to create a private remedy. The legislative history shows that the Records Disposal Act was intended to provide an orderly procedure for disposal of records of insufficient value to justify the cost of retention. H.R. Rep. No. 559, 78th Cong., 1st Sess. (1943). Although the Act directed agencies to dispose of documents only in accordance with the procedures in the Act, see 44 U.S.C. 3314, nothing in the legislative history suggests that members of the general public may enforce this obligation. As for the Federal Records Act of 1950, the legislative history shows that it was intended to require agencies to create documents adequate to record the essential business of the agency—but no more. FRA Senate Report at 2, 4. See U.S. Commission on Organization of the Executive Branch of the Government, *Task Force Report on Records Management in the United States*

[21] This case is therefore quite unlike *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, No. 77-1645, set for reargument (Apr. 30, 1979), in which we have argued that a private right of action should be implied to enforce the fiduciary duty rules created by the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 to 80b-17. Fiduciary duties imply personal rights, running to identified beneficiaries. The strength of the personal right in *Transamerica* calls for acknowledgement of a private remedy, just as the lack of any personal right here calls for confining remedies to the one identified by the statute—suit by the Attorney General.

Government 4, 6, 9 (1948). Although the Act directs the Administrator of General Services to provide guidance to agencies in developing records management programs and directs the Administrator to notify the agency head of any unlawful removal of records coming to his attention (see 44 U.S.C. 2905), the legislative history does not suggest any private remedy whatever for the failure of the agency to abide by its obligation under the Act or under records management programs established thereunder. See FRA Senate Report at 15; H.R. Rep. No. 2747, 81st Cong., 2d Sess. 14 (1950). There is no history of comparable private suits, and no analogous right at common law. The silence of the legislative reports thus reflects an assumption so plain as to be beyond doubt: no one thought that housekeeping statutes for the Executive Branch could be enforced in private suits. To imply a private remedy in the fact of such silence "is a hazardous enterprise, at best." *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 10.

Third, a private remedy would frustrate a legislative scheme that allows agency heads to decide what should or should not be regarded as "records" and, even if they are, whether they are worth retrieving. The Acts give the Attorney General and the Administrator of General Services—Executive Branch officials—the "policing" power. To require agencies to defend their judgments in these matters under the Federal Records Act in every FOIA case in which the agency had not retained the records would substantially disrupt records management programs. A private party could argue, for example, that certain FBI records should be kept for 20 years rather than 10. Resolution of such disputes would be burdensome because each would turn on the specific

types of transactions involved, the specific need of each agency for a permanent record of the transactions, and the type of record that would suffice. Disparate judicial decisions could make recordkeeping both risky and cumbersome. The pressure of such suits would encourage agencies to retain or retrieve more and more materials to avoid FOIA suits—all to the frustration of the goal of the Federal Records Act to reduce federal records to the minimum necessary (see note 28, *infra*). Rights of action by private parties thus would interfere with the operation of agency housekeeping and would amount to an undesirable second-guessing of enforcement decisions made by the Attorney General. The Court has declined to imply private rights of action from a statute in these circumstances. See *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974).

B. *The FOIA Does Not Create A Private Remedy To Enforce Agency Obligations To Retain Or Retrieve Records*

Neither the language nor the legislative history of the FOIA refers to the Records Disposal Act, the Federal Records Act, or any other record keeping obligations. See S. Rep. No. 813, 89th Cong., 1st Sess. (1965) (FOIA Senate Report); H.R. Rep. 1497, 89th Cong., 2d Sess. (1966) (FOIA House Report).[22] Under such circumstances, it would be incongruous to find in the FOIA an unexpressed intent to supply what Congress omitted from the records acts. Each law stands independently and is enforced only through the procedures provided in each Act. For example, the Federal Records Act requires agencies to *create* documentation of its essential decisions and policies. But the FOIA may not be used to force an agency to create any document, even one that the Federal Records Act requires. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 192 (1975). In short, the rights of an FOIA plaintiff are neither improved nor diminished by any obligations agencies may have to create, to retain, or retrieve documents under the Federal Records Act.

The FOIA establishes only one remedy—an action in the district court to prevent an agency from "withholding" documents to which the FOIA applies. 5 U.S.C. 552(a)(4)(B). An agency "withholds" a document only when it declines to produce one in its possession. As the Attorney General's memorandum explaining the provisions of the FOIA states, the Act "refers * * * only to records in being and in the possession or control of an agency. The requirement of this subsection imposes no obligation to compile or procure a record in response to a request." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23–34 (1967). Accord, *Forsham* v. *Califano*, 587 F.2d 1128 (D.C. Cir. 1978), cert. granted, No. 78–1118 (May 14, 1979).

The FOIA does not require an agency to *keep* any documents, and the decision to dispose of a document thus cannot be an unlawful withholding. Neither the

[22] The same is true of the FOIA amendments in 1974 and 1976. H.R. Rep. No. 93–876, 93d Cong., 2d Sess. (1974); S. Rep. No. 93–854 (Part 1), 94th Cong., 2d Sess. (1974); S. Rep. No. 94–354, 94th Cong., 1st Sess. (1975); S. Rep. No. 94–1178, 94th Cong., 2d Sess. 24–25 (1976); H.R. Rep. No. 94–880, 94th Cong., 2d Sess. 23 (1976).

statutory language nor the legislative history suggests that Congress wanted agencies to create or retain documents merely to be able to respond to FOIA requests. To the contrary, the central concern was preventing agencies from "withholding" materials actually in their possession. The FOIA replaced the "public-information" section of the Administrative Procedure Act, ch. 324, Section 3(c), 60 Stat. 2387, which required that "[s]ave as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." Congress found that this provision gave the agency too much discretion to decide what should be public and provided no judicial remedy for wrongful withholding. FOIA Senate Report at 5; FOIA House Report at 4-9; see also *Attorney General's Manual on the Public Information Section of the APA* 24 (1947). Two of the central goals of FOIA were to reduce that discretion by requiring production unless one of nine exemptions applied and to supply judicial redress for "withholding." FOIA House Report at 2, 5-6, 8-9; FOIA Senate Report at 5-6. The FOIA thus addressed agencies' withholding what they had in their possession; Congress simply was unconcerned in 1966 with what should be in the agencies' possession.[23]

Moreover, to construe the FOIA to require agencies to retrieve documents would present an enormous practi-

[23] Neither of the courts below found that the agency released the notes in anticipation of the subsequent requests for the purpose of defeating FOIA disclosure. This case does not, therefore, present the issue of the extent to which, if at all, such anticipatory relinquishment of records might constitute a "withholding."

cal problem. Every year millions of documents flow in and out of agencies. Many are examined only briefly and forwarded to other agencies or to the private parties to whom they belong. The Federal Records Act contemplates that such documents need not be acquired or retained by agencies; indeed, it requires, in many cases, that the documents be transferred or destroyed. It is inconceivable that in enacting the FOIA Congress silently disrupted this established practice and imposed, without saying so, a duty to retain or to retrieve documents.[24]

A Freedom of Information Act request thus entitles the requesting party to examine only those agency records in the agency's possession at the time the request is made. See *Ciba-Geigy Corp.* v. *Mathews*, 428 F. Supp. 523, 531 (S.D.N.Y. 1977); *Nichols* v. *United States*, 325 F. Supp. 130, 137 (D. Kan. 1971), aff'd, 460 F.2d 671 (10th Cir.), cert. denied, 409 U.S. 966 (1972). This construction gives "withhold" its natural meaning. An agency "withholds" a document within the meaning of Section 552(a)(4)(B) only when it refuses to produce documents in its custody. Once such withholding occurs—and a transfer after an FOIA request could well be a withholding, just as any other kind of refusal to produce available documents is a withholding—a court may exercise broad equitable powers to remedy the violation, even if this means compelling production

[24] A related problem is presented by the millions of private documents in the hands of private contractors, which agencies have a right to examine. See *Forsham* v. *Califano*, *supra*. We argue in *Forsham* that FOIA does not require an agency to procure such information so that it can be inspected.

of the withheld document from a third party.[25] Cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 18–20 (1974). If the agency does not have custody of the document at the time the request is made, however, there is no withholding—and no occasion for any judicial remedy.[26]

The error of the courts in this case, then, was in imposing a remedy without first finding that the agency had "withheld" records. Because the notes were not in the possession of the State Department at the time MAP and the RCFP requesters asked for them, the agency did not withhold the notes.[27] That should have been the end of this case.

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[25] The court, in exercising its equitable powers, might order the agency to retrieve the documents by either a retrieval action under Section 3106 of the Federal Records Act of 1950 (if the documents were "records") or a replevin action (if the documents were nonrecord materials belonging to the United States). If, as here, the court had personal jurisdiction over the custodian of the materials, it could order the transfer directly.

[26] There may be a number of questions in determining whether an agency has "custody" of the documents. *Forsham* v. *Califano*, *supra*, presents one of them. Others can be imagined. If, for example, documents were in the control of an agency but located in the home of its employee, the agency would have custody; but if the employee held them under a (disputed) claim of right, the outcome is not so clear. We express no view here on the many different patterns that could arise. The present case is an easy one, because the State Department had neither possession nor an undisputed right to obtain possession of the notes.

[27] The Safire request was made before the transfer of the notes to the Library of Congress. No withholding took place with respect to this request, however, because the State Department *never* had possession or control of the notes made while Kissinger was Assistant to the President for National Security. See pages 52–53, *infra*. A fortiori, the agency was not required to obtain them.

II

THE PRESENT RECORD IS INSUFFICIENT TO DETERMINE WHETHER THE NOTES ARE RECORD OR NONRECORD MATERIALS

If, contrary to our primary submission, the Court holds that there is a private right of action to compel the return of "records" removed before any FOIA request for them is made, it would become necessary to consider Kissinger's contention that the notes are not "records" under the Federal Records Act. If the notes are not "records," Kissinger argues, their removal was proper and any private action would fail on the merits. If the notes are not "records" but "nonrecord" materials, it also would be necessary to consider whether a private plaintiff may compel retrieval of such "nonrecord" materials. In our view, final resolutions of these questions are inappropriate at this time, because the grant of summary judgment by the district court precluded the creation of an adequate record.

A. *Removal of Nonrecord Materials May Be Authorized by Law*

The FOIA requires the production of "records" or "agency records," which it apparently treats as synonomous. The FOIA does not define either term. We agree with the apparent assumption of the courts below that "agency records" under FOIA includes at least all "records" under the Federal Records Act. As we have discussed, documents are "records" under the Federal Records Act of 1950 if they are (i) "made or received by an agency" in connection with "the transaction of public business" and (ii) are "preserved or ap-

propriate for preservation by that agency" as evidence of the "organization, functions, policies, decisions, procedures, operations or other activities of the Government" or because of "the informational value of data in them." 44 U.S.C. 3301. The head of each agency must identify in the first instance what type materials are "appropriate for preservation by [the] agency." See pages 27-28, *supra*.[28]

[28] Federal legislation on this subject has conferred on the agency greater and greater discretion to determine, in the first instance, whether a document should be deemed a record. The First Congress authorized the executive departments to issue regulations regarding custody, use, and preservation of records. See 1 Stat. 28, 49, 65, 68, 553; see also 9 Stat. 395; 16 Stat. 163; 17 Stat. 283, 284; 18 Stat. 169. These "housekeeping" provisions eventually were combined in a single, general statute. See 5 U.S.C. 301. In 1853, Congress made it a crime to destroy, deface, or take away any "public records." See Act of Feb. 26, 1853, ch. 81, Section 4, 10 Stat. 170, modified, Act of Mar. 4, 1909, ch. 321, Section 128, 35 Stat. 1111, now codified at 18 U.S.C. 2071. This made it necessary to obtain congressional approval to dispose of unneeded records. In 1889, Congress enacted the first government-wide disposal statute, which directed the head of each executive department to submit to Congress lists of files no longer needed for current business and proposed for disposal. Act of Feb. 16, 1889, ch. 171, Section 1, 25 Stat. 672. Congress continued to review the lists until 1970 when, having "found it impossible to maintain comprehensive surveillance over the disposition of an extremely heavy volume and variety of executive papers," Congress gave the Administrator of General Services the final word on the approval of disposal schedules. S. Rep. No. 91-914, 91st Cong., 2d Sess. 2 (1970); see 84 Stat. 321.

In 1943 the Records Disposal Act provided an alternative to the disposal-list method of managing agency documents, which could not keep pace with the mounting volume of federal records. For the first time, Congress defined the term "record," a definition which has remained unchanged and is now codified a 44 U.S.C. 3301. Significantly, Congress adopted the definition in order to "place the responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved" and to "make it clear

All government documents that do not qualify as "records" under an agency's records management program are "nonrecord materials." Such materials belong to the government, but they are not preserved as "records" by the agency. The Administrator of General Services has published guidelines to all agencies stressing that "[n]onrecord materials, such as * * * preliminary worksheets, and similar papers that need not been made a matter of record, shall not be incorporated in the official files of the agency." 41 C.F.R. 101-11.401-3(d).[29]

that [agencies] are not obliged to consider every scrap of paper on which writing or printing appears as a record." H.R. Rep. No. 559, 78th Cong., 1st Sess. 1 (1943).

The Federal Records Act was enacted in 1950; it required "the head of each Federal agency" to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency * * *." 44 U.S.C. 3102. The Senate report stressed that "[i]t is well to emphasize that records come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them. S. Rep. No. 2140, 81st Cong., 2d Sess. 4 (1950). See generally U.S. Commission On Organization of the Executive Branch of the Government, *Task force Report on Records Management in the United States Government* (1948).

In sum, since at least the 1943 Congress has stressed the need to streamline agency document procedures to assure that the agency records contain "adequate" documentation of agencies' organizations, functions, policies, decisions, procedures, operations or other activities or valuable information—but no more. In achieving this balance, Congress has stressed that "not every scrap of paper on which writing or printing appears" need be retained as an "agency record," and that the "head of each Federal agency" has the responsibility "in the first instance" to sift record material from nonrecord material.

[29] One decision has held that such preliminary notes, voluntarily made by government engineers in the course of their employment to assist them in doing their work, were the personal

An agency employee typically has a third category of documents in his office—materials that belong to him personally, such as a personal library, private correspondence, or a diary. Such personal materials do not include, however, information gathered by a government official or employee within the scope of his employment for the purpose of recording transactions related to the official's employment and guiding the activities of other government employees. Such information belongs to the United States. See, *e.g.*, *United States* v. *First Trust Co. of St. Paul*, 251 F.2d 686, 688 (8th Cir. 1958); *Scherr* v. *Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), cert. denied, 397 U.S. 936 (1970); *United States* v. *Chadwick*, 76 F. Supp. 919, 923 (N.D. Ala. 1948); *Sawyer* v. *Crowell Pub. Co.*, 46 F. Supp. 471, 473 (S.D.N.Y. 1942), aff'd, 142 F.2d 497 (2d Cir.), cert. denied, 323 U.S. 735 (1944); *Nixon* v. *Sampson*, 389 F. Supp. 107, 133–134 (D.D.C.), stayed *sub. nom. Nixon* v. *Richey*, 513 F.2d 427 (D.C. Cir. 1975), dismissed as moot, 437 F. Supp. 654 (D.D.C. 1977); cf. *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962), decision on remand, 268 F. Supp. 444, 448–449 (D.D.C. 1967). That the notes were prepared in the course of Kissinger's responsibilities as Secretary of State seems clear enough. Any doubt on that score is eliminated by the State Department's policy, which prohibited employees from monitoring tele-

property of the employees because the employees showed the notes to no one else. *Porter County Chapter of the Izaak Walton League* v. *AEC*, 380 F. Supp. 630, 633 (N.D. Ind. 1974). In the present case, however, Kissinger used the notes to record agency business, not simply as a means of communicating with himself, and circulated the information to other officials in the State Department.

phone calls except where "deemed absolutely essential to the conduct of business" (A. 122a–126a).[30]

Kissinger does not contend that the notes were his personal property ab initio. He argues, instead, that the notes were nonrecord materials, but that "[i]f such materials are not to be filed as official records, they may be discarded or kept as the employee chooses," and that "[i]f the employee chooses to keep the materials, his personal files are the logical place in which to store them" (78–1088 Pet. Reply Br. 5–6 n.11). He essentially argues that, because he could have thrown the notes away, no one may object if he treats them as his personal property.

Given their statutory duty to manage and dispose of documents, agencies have authority to relinquish unneeded nonrecord materials to departing officials. Once this occurs, the copies of such materials belong to the officials, even if the information in them does not. The State Department's records management program, for example, allows a departing employee to retain copies of nonclassified materials related to his employment. 5 FAM 417.1. This is common practice.[31] See National Study Commission on Records and Documents of Federal Officials, *Final Report* 17–19 (1978). Similarly, a records management program, either explicitly or by well defined custom, might allow a departing employee to retain the originals of unneeded nonrecord materials; it would be senseless to make

[30] We assume that notes of Kissinger's purely personal affairs are his personal papers. Our discussion is limited to those notes containing references to agency policies, decisions and other agency transactions.

[31] Extra copies are specifically excluded from the statutory definition of "record." 44 U.S.C. 3301.

photocopies for the employee only to "dispose of" the originals. Until the relinquishment occurs, however, all such materials remain the property of the United States (see A. 201a, 216a, 221a-222a, 227a, 233a, 237a, 262a).[32]

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[32] This analysis, we think, best explains the tradition of departing cabinet officers retaining their working files, which otherwise would be thrown out. See National Study Commission on Records and Documents of Federal Officials, *Final Report* 13-16, 29-32 (1978). In this tradition the Manuscript Division of the Library of Congress acquired by deed the public papers of at least 41 Cabinet members including nine Secretaries of State (prior to acquiring Kissinger's papers). Library of Congress, *Report to the National Study Commission on Records and Documents of Federal Officials: Personal Papers of Federal Officials* 35-37 (1976).

In at least two recent administrations, "cabinet papers" have been circulated to departing cabinet members to explain what papers they might take with them. Both papers acknowledge that "records" within the meaning of the Federal Records Act must remain behind but observe that agencies have some discretion in defining what is a record. The papers suggest that cabinet officers may retain extra copies of nonclassified record materials and may retain preliminary notes and other nonrecord materials. See Removal of Papers By Retiring Department And Agency Heads, White House Cabinet Paper, July 27, 1959, at 3; Memorandum of National Archives and Records Service, GSA, Donation of Personal Papers to the Richard Nixon Library (Nov. 1972) (A. 261a-264a); Memorandum of the Department of State to the National Study Commission on Records And Documents of Federal Officials (A. 199a-209a).

Although it is true that a number of presidents have regarded papers generated in the White House as their personal property, this Court has never addressed the matter. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 445 n. 8 (1977). Attorney General Saxbe rendered a formal opinion that such materials belong to the President in light of unique historical considerations. 43 Op. Atty. Gen. 1 (1974), see also *Folsom* v. *Marsh*, 9 F. Cas. 342, 345 (1841) (Story, J.) (as against claim by private party, the presidential papers of George Washington were his personal property); cf. *In re Roosevelt's Will*, 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947) (President

Consequently, if our primary submission is incorrect, resolution of this controversy must turn on application of these principles: (1) within the limits imposed by the Federal Records Act, agencies have discretion to draw the line between record and nonrecord materials for their own purposes, and (2) an agency may dispose of unclassified nonrecord materials by allowing the employee to retain them as his personal papers, but they do not become his property until the agency relinquishes them to him; once relinquished under an agency rule, the documents are the personal papers of the employee and are not subject to the FOIA or the records acts. These principles determine whether the notes are record or nonrecord materials.

B. *The Record Does Not Permit Resolution Of The Question Whether The Notes Are Records Or Nonrecord Materials*

It is not possible to apply to this case the principles we have set out. The problems stem from the fact that the State Department's records management regulations do not address the status of Kissinger's notes, that the interpretation of the regulations by the Legal Adviser is ambiguous in certain respects, that the record does not fully describe any custom and usage at the State Department with respect to retention of such notes, that the notes are not in the record, and that the extracts are not in the record.

Roosevelt's gift of his papers to the United States valid); see generally National Study Commission *Final Report*, *supra* at 13-16, 29-32. There is no need to pursue this analogy, however, because Congress has changed the rule. Effective January 20, 1981, almost all presidential materials will be the property of the United States. See Pub. L. No. 95-591, 92 Stat. 2523, 2524, 2528.

The Department of State's records management program appears at 5 FAM 410 *et seq.*, and The Records Management Handbook of the Department of State (1968) ("Handbook").[33] The program does not explicitly address the status of the telephone notes. It requires that "discussions of significance * * * by telephone" be summarized for the permanent files (5 FAM 423.2-1):

> Decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record. The information should be written in the form of aide-memoire, memorandums of conversation, or memorandums to the file.

This regulation does not, however, require the creation of notes of the sort at issue here. It requires only that *information* of significance be permanently recorded, not that notes be created or retained after the information has been incorporated in final memoranda. To the contrary, "working files," which include "rough drafts and working papers" are to be "disposed of as soon as they have served their purpose." Handbook ¶271-272. It is enough that "decisions, commitments, and discussions of any significance" referred to on the phone be summarized and entered in agency files.[34]

[33] In general, the agency's Foreign Affairs Document and Reference Center is responsible for the staff supervision, coordination, and management of files, records equipment, forms, administrative reports, correspondence, directives, mail flow and procedural studies and records disposition. The Center is responsible for developing standards that assure "[a]dequate and proper documentation of the Department's activities" while creati[ng] "only those records essential to the conduct of current business." 5 FAM 414.1.

[34] The district court evidently concluded that Kissinger was required to create the notes (Pet. App. 56a, 58a) and that required documentation constituted records. This is not so. See note 20, *supra*. The State Department's rules only required Kissinger to make a record of "[d]ecisions, commitments, and discussions of any significance * * *." 5 FAM 423.1. Kissinger was free to do this from memory or to make preliminary notes that could be thrown away after the final record was made. This was the view of the Legal Adviser and is plainly correct.

Personal correspondence that discusses matters of official policy also is treated in this way. In such a case, the personal correspondence must be placed in the agency files unless the portions pertaining to functions or activities of the Department or a post are extracted and made part of official records.[35]

For these reasons, among others, the Legal Adviser determined that the telephone notes need not be entered in the agency records but required that extracts of official matters reflected in the notes be made part of the agency files (Pet. App. 65a-69a).[36] This determina-

[35] See 5 FAM 432, which provides:

> Papers of a personal character which pertain only to an individual's private affairs and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records of the office at all times. When official policy matters are discussed in personal correspondence, that portion pertaining to functions or activities of the Department or a post is to be extracted and made a part of the official records. Official-informal letters are official records and as such are subject to the same laws, regulations, and legal restrictions governing their maintenance and disposition as those relating to any official documents.

[36] This conclusion is in substantial accord with the Administrator's guidelines issued under 44 U.S.C. 2904. The guidelines call for controls "to insure that important policies and decisions are adequately recorded; that routine operational paper work is kept to a minimum; and that the accumulation of unnecessary files is prevented." 41 C.F.R. 101-11.102-3. The guidelines provide that "[s]ignificant decisions and commitments reached orally (person to person, by telephone, or in conference) should be reduced to writing and included in the record." 41 C.F.R.

tion appears consistent with the records management program adopted by the Department of State, is a reasonable construction of the agency's own rules, and is therefore, insofar as it is applicable, dispositive here. *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The difficulty lies in applying this conclusion to the case at hand. The record does not disclose whether the extracts prepared were sufficient to satisfy this construction of the records management program. Because the record does not contain either the notes or the extracts, they cannot be compared.[37] The record does

101-11.202-2(b). Where "matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files * * * ." 41 C.F.R. 101-11.202-2(d). Concerning preliminary notes, the guidelines state: "Nonrecord materials, such as extra copies of documents preserved for convenience of reference, stocks of processed documents, preliminary worksheets, and similar papers that need not be made a matter of record, shall not be incorporated in the official files of the agency. To the maximum extent possible, material not required for record purposes shall be disposed of; it should not be sent to file." 41 C.F.R. 101-11.401-3(d).

[37] The extracts must be adequate summaries of the transactions recorded within the meaning of 5 FAM 423:1:

> The recording of activities of officials of the Department of State and all of its component elements should be complete to the extent necessary to (a) facilitiate the making of decisions and policies and the taking of actions by the incumbents and their successors in office; (b) fulfill the requirements of Federal statutes; (c) make possible a proper scrutiny, by the Congress and by other duly authorized agencies of the Government, of the manner in which the functions of the Department of State have been discharged; (d) protect the financial, legal, and other rights of the Government and of persons affected by actions of the Department of State; and (e) provides materials for research and historical purposes.

not contain any indication whether the State Department believes the extracts are sufficient for purposes of its records management program. The Legal Adviser himself viewed only some of the notes (evidently ones prepared before Kissinger became Secretary of State), and reviewed none of the extracts, so far as the record discloses (A. 82a, 259a).

If the extracts are insufficient, the notes are arguably "records" because they constitute the only record of important agency transactions, and they would be "appropriate for preservation" as "evidence" thereof. Neither the Legal Adviser's opinion nor the agency's rules address the status of notes that are not properly extracted. In short, in the event the extracts are insufficient, the record does not illuminate the question whether the agency's records management program, perhaps as elaborated by custom and usage, continues to regard the notes as nonrecord material.

C. *Some Nonrecord Materials Are Covered By The FOIA*

Even if the notes have never been "records" under the Federal Records Act, a further difficulty is presented by legal issues concerning the extent to which *non*record materials are subject to FOIA disclosure. We believe some, if not all, nonrecord materials in the custody of an agency are obtainable under the FOIA.[38] The issue remains, however, whether the FOIA

[38] Arguably, only materials that constitute "records" under 44 U.S.C. 3301 are reached by the FOIA. The State Department and other agencies have adopted FOIA regulations that define "agency records" identically with the "records" under 44 U.S.C. 3301. *E.g.*, 22 C.F.R. 6.1 (b); see also 41 C.F.R. 105-60.103(a); *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23 (1967). Because the Federal Records Act requires agencies to "make and pre-

reaches nonrecord materials lost by an agency before an FOIA request is made for them. The reliance by the courts below on the fact that the notes were "records" under the Federal Records Act and the seemingly mandatory duty of the agency to retrieve them under 44 U.S.C. 3106 suggest that the courts might have reached a different result if the notes had been nonrecord materials.

Kissinger argues that a finding that the notes are nonrecord materials must require a conclusion in his favor, because (in his view) nonrecord materials are the personal papers of the employee, to keep or to throw away as he pleases. Nonrecord materials, however, plainly belong on their creation to the agency. The agency may determine the time and manner by which, if at all, employees may acquire or retain nonrecord ma-

serve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency" (44 U.S.C. 3101), access to such records ordinarily should be sufficient to enable the public to identify agency rules and decisions, to detect incompetence and corruption, and otherwise to fulfill the goals of the FOIA. See generally *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *Department of Air Force* v. *Rose*, 425 U.S. 352, 360-362 (1976); *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). The Act requires agencies to supply the requested records within 10 days except in unusual circumstances. 5 U.S.C. 552 (a)(6)(A) (i). In view of the numerous locations where record materials alone may be maintained—such as regional offices, records centers, and agency headquarters—this severe time limit suggests that Congress did not intend for the agency routinely to sift nonrecord materials, which (by definition) are not in agency files, are not indexed, and are generally known only to the employee possessing them. For examples of "nonrecord" materials held not to be "agency records" for purposes of the FOIA, see *Warth* v. *Department of Justice*, 595 F. 2d 521 (9th Cir. 1979) (judicial transcripts in the possession of agencies); *Goland* v. *CIA*, No. 76-1800 (D.C. Cir. May 23, 1978) (transcript of congressional hearings in the possession of the CIA), pet. for cert. pending,

terials. Although we agree that once relinquished, nonrecord materials become the personal papers of the employee and are not subject to the FOIA, the State Department's records management program required retention of the notes (even if nonrecord materials) as agency "working files" so long as they are needed to prepare extracts recording significant oral communications. "Rough drafts and working papers," which seem to describe the notes, should be placed in "working files." *Handbook* at ¶272. 'Office working files," however, "are not considered personal files," *id.* at ¶188, and must be kept separate from personal files. *Id.* at ¶273. Working files may be "disposed of" only when no longer needed. *Id.* at ¶271. In view of Kissinger's re-

No. 78-1924; *Cook* v. *Willingham*, 400 F.2d 885 (10th Cir. 1968) (presentence reports).

On the other hand, the Office of Information Law and Policy of the Justice Department, which advises all federal agencies on compliance with FOIA, has concluded that all "nonrecord" materials (within the meaning of federal records programs) that may be readily identified and located within the time limits imposed by the FOIA are "agency records" under the FOIA. Subsection (c) of the FOIA provides that the Act "does not authorize the withholding of information or limit the availability of records to the public." The Senate Report stated that "[t]he purpose of the subsection is to make clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions * * *." FOIA Senate Report at 10 (1965) (emphasis in original). Accord, FOIA House Report at 11-12. This comment arguably explains Congress' apparent use of the words "information," "materials," and "documents" interchangeably with "records."

We need not address further which nonrecord materials are covered by the FOIA inasmuch as this question was not addressed below and, even if nonrecord materials are discoverable under the FOIA where they are in the possession of the agency, here the materials were not in the possession of the agency when the requests were made.

sponsibility to prepare memoranda on all "decisions, commitments, and discussions of any significance," 5 FAM 423.2-1, the notes were needed for making the required extracts, as the Legal Adviser concluded (A. 82a, 93a-94a). This process was not completed until Kissinger left office (A. 90a, 94a). Consequently, if the notes were nonrecord materials, they should have been maintained in working files of the agency throughout Kissinger's tenure as Secretary of State. And their removal without the substitution of adequate extracts would have been unauthorized.[39]

In summary, in the event the Court holds that an FOIA plaintiff may compel the return of "records" (within the meaning of the Federal Records Act), even though the request was made after the documents' departure from the agency, it should remand the case for further consideration of these questions.

III

THE STATE DEPARTMENT WAS NOT REQUIRED TO PRODUCE THE NOTES MADE WHILE KISSINGER WAS ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS

If the Court agrees with the arguments we made in Part I of this brief (pages 26–38, *supra*), it follows directly that the judgment of the court of appeals must be

[39] This accords with the State Department's statement that "until such official material is extracted for the Department's records, the Department has a predominant interest in the paper that is otherwise personal" (A. 204a) (State Department Memoranda to the National Study Commission on Records and Documents of Federal Officials).

affirmed insofar as it is challenged by petitioners in No. 78-1217. The notes of Kissinger's conversations made at the White House while he was Assistant to the President for National Security Affairs were not in the custody of the Department of State at the time they were sought by the RCFP requesters. Indeed, they were never in the custody of any "agency" for purposes of the FOIA. The President and his personal staff are not an "agency,"[40] the Library of Congress is not an "agency," and the papers were not in the control of the State Department at any time. They were not generated in the State Department, they never entered the Department's files, and they were not used by the Department for any purpose. They were—so far as the Department of State was concerned—Kissinger's personal property,[41] and they were no more subject to the FOIA than were other materials Kissinger may have had in his office, materials such as personal books, diaries, papers indicating title to his car, drafts of personal speeches, and so on.[42]

[40] The FOIA applies to the "Executive Office of the President" (5 U.S.C. 552(e)). The "Executive Office" does not include the "Office of the President," which contains the President and his personal advisers. See S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 15 (1974); H. R. Rep. No. 93-876, 93d Cong., 2d Sess. 20 (1974); cf. *Soucie* v. *David*, 448 F.2d 1067, 1074-1076 (D.C. Cir. (1971). The "Executive Office" contains entities such as the Council on Environmental Quality, the Council of Economic Advisers, and so on.

[41] Whether they were personal papers of Kissinger so far as the United States is concerned is another matter. It is possible that some of the notes may be covered by the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107 note. This possibility, however, is not material to the disposition of this case.

[42] This point disposes of the arguments of Safire, who requested some of the notes while they were in the State Depart-

But even if the Court disagrees with us and holds that the notes made while Kissinger was Secretary of State are "agency records" that were "withheld," the Court should reject the arguments of petitioners in No. 78-1217 concerning the notes made by Kissinger at the White House. First, the FOIA is designed to permit inquiry into how an agency performs its official duties, not to force agencies to serve as a research arm of the requester or a lending library. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *Lybarger* v. *Cardwell*, 577 F.2d 764, 766-777 (1st Cir. 1978). A document that simply passes through an agency, a document created elsewhere and not reflecting on the agency's performance, is not an "agency record."[43] Consequently, even if Kissinger's notes as Assistant to the President had found their way to the State Department's files, and even if a request for them had been made while the notes were at the State Department, they would not have been subject to production. But this is not what happened. The NSC notes never entered the Department's files. Instead, Kissinger simply kept them in his office rather than elsewhere. Even if the notes he generated as Secretary are "agency records" of the State Department, Kissinger's notes from his prior employment were more State Department records than was his personal library.

Second, petitioners' position is not improved by their claim that some of the notes were records of the National Security Council. Petitioners apparently concede (78-1217 Pet. 6-7) that they are not entitled to any notes that pertain to Kissinger's activities other than his role with respect to the National Security Council. They maintain, however, that the NSC is an "agency" for purposes of the FOIA and that they are therefore entitled to the notes that "relate to the affairs of the NSC (Pet. 11). Notes that simply "relate" to the affairs of the NSC, however, are not NSC records. Kissinger was the President's personal adviser, not an employee of the NSC. Kissinger was assisted by the NSC staff in providing advice to the President but did not serve at the pleasure of the NSC. Kissinger's notes that happened to pertain to NSC matters were no more records of the NSC than his notes that happened to "relate to" farm matters were records of the Department of Agriculture.

The greatest stumbling block for the RCFP requesters, however, is that they never sought the documents from the NSC itself. Where, as here, neither the NSC nor the State Department had custody of the records at the time the request was filed, surely the requesters should have made their request of the NSC (whose "records" the notes allegedly were) rather than of the State Department, which was essentially a stranger to them. There will be time enough to consider whether one agency must disclose under the FOIA documents created by another agency when a request for disclosure is presented to an agency that possesses the documents.[44]

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ment's building but not in the Department's custody and control.

[43] Cf. *Warth* v. *Department of Justice*, 595 F.2d 521 (9th Cir. 1979); *Goland* v. *CIA*, No. 76-1800 (D.C. Cir. May 23, 1978), petition for cert. pending, No. 78-1924; *Cook* v. *Willingham*, 400 F.2d 885 (10th Cir. 1968).

[44] Safire's FOIA request for the notes was presented while they were located in the State Department building, and this aspect of our argument does not apply to his request. His request nonetheless is defeated by the other contentions we have

IV

INSPECTION AND PROCESSING OF THE NOTES FOR RELEASE UNDER THE FOIA WOULD NOT VIOLATE KISSINGER'S CONSTITUTIONAL PRIVACY INTERESTS

If the Court agrees with our submission that there is no warrant for ordering the Library of Congress to return the notes to the Department of State, it will be unnecessary to consider Kissinger's contention that any processing of the notes for possible release under the FOIA would violate his constitutional right of privacy. If the Court disagrees with our principal submission, however, and orders the notes transferred to the State Department, then it should reject Kissinger's argument in this regard.

Kissinger's contention is foreclosed by *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455–465 (1977). The Court held in *Nixon* that the transcription of tapes made in the Oval Office, the processing of those transcripts for possible release, and the thorough review of all written materials concerned with public business did not violate President Nixon's constitutional interests. The processing of Kissinger's notes is no more offensive than the processing of Nixon's material. Like Nixon's tapes and papers, Kissinger's notes were made by public employees on government time; the

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made, including the fact that the State Department never had custody of the notes. It is important to recognize, moreover, that Safire waited more than a year after his FOIA request was denied before he brought suit. During the year the notes were transferred to the Library of Congress. In determining whether to grant the extraordinary relief of requiring a non-agency to deliver the notes to an agency, the district court, exercising its equity powers, should have taken this delay into account.

conversations predominantly concerned official business; and any admixture of private materials with the public business is attributable to Kissinger's instruction that notes be made indiscriminately. The commingling of public and private affairs was Kissinger's choice.

A holding by this Court that the notes must be transferred to the State Department necessarily would rest on a conclusion that the Department not only has a right of access to the portions of the notes that deal with public business but also never should have let the notes leave the building. Such a holding necessarily defeats Kissinger's claim of privacy. The Department's rights in public papers cannot be defeated by Kissinger's decision to mix private affairs in with public business and to order notes to be taken indiscriminately. See also *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976), which holds that when public and private matters are mingled in a document, both administrative officials and courts may screen the document to separate the public from the private and to release the public materials.

Indeed, Kissinger's arguments are significantly weaker that Nixon's. Many of the tapes involved in *Nixon* had not been transcribed or heard by anyone, and Nixon contended that he made the tapes only on the assumption that he would be the only person ever to hear them. Here, by contrast, all of the notes were made by Kissinger's secretary, not by machine. The notes were circulated to Kissinger's staff; all of them thus were seen by many eyes. And when the notes were donated to the Library of Congress they were fully reviewed, and extracts were made. None of the screening that the district court's order requires would invade Kissinger's privacy to a greater extent than the

invasion that already has taken place for the purpose of making the extracts.

CONCLUSION

To the extent the judgment of the court of appeals denies the relief sought by the plaintiffs, it should be affirmed. To the extent the judgment requires some of the notes to be transferred from the Library of Congress to the Department of State, it should be reversed. The case should be remanded with instructions to dismiss the complaints.

Respectfully submitted.

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JULY 1979

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER, *Petitioner,*

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al., Respondents,*

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et. al., Petitioners,*

v.

HENRY A. KISSINGER, *et. al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et. al.*

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BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et. al.*

QUESTIONS PRESENTED

1. Are transcripts of Henry Kissinger's official telephone conversations while Secretary of State—prepared to aid him in performing his governmental duties—"records" of the State Department under

federal statutes which could only be removed from Department custody if the Department and the General Services Administration determined that they had no governmental or archival value?

2. Does the Freedom of Information Act apply to records that were unlawfully removed from State Department custody and remain in its legal control and, if so, could the district court exercise its equitable powers to compel the Department to repossess the transcripts so they can be disclosed under the Act?

3. When Mr. Kissinger moved transcripts of his telephone conversations as Assistant to the President to the State Department and the President made no effort to exercise continuing control over those transcripts, did they become "records" of the Department for purposes of the Freedom of Information Act?

4. Are portions of the transcripts which relate to Mr. Kissinger's duties as chief executive of the National Security Council subject to disclosure under the Act when the State Department was the last agency which had physical custody over them?

5. Does the Constitution bar State Department record officers from reviewing those portions of the transcripts that touch on personal matters in order to insure that all official discussions which the transcripts contain are screened for possible disclosure?

STATEMENT OF THE CASE

A. The Creation and Functions of the Transcripts

During his eight years as Assistant to the President and Secretary of State, Henry Kissinger's secretaries routinely monitored his telephone conversations and

recorded their contents either by shorthand or on tape.[1] A. 150a, 244a. These stenographic notes and tapes were used to prepare detailed, often verbatim transcripts of Mr. Kissinger's conversations. A. 138a, 175a, 244a, 249a. The secretaries participating in this process were all government employees; the typewriters and monitoring equipment they employed were owned by the government; and the transcripts were prepared on government time and government premises. A. 83a, 138a. After their creation, the transcripts were retained as part of Mr. Kissinger's duties and stored in his White House and, later, Department of State offices. A. 139a, 150a, 244a.

Mr. Kissinger kept this detailed record of his telephone conversations to assist him and his staff in performing their official responsibilities. He has characterized the transcripts as "work aids to ease the administrative burdens" of his job. A. 245a. As he has stated, "[m]y purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow-up on matters discussed orally." A. 244a. In an earlier lawsuit, Mr. Kissinger testified that the transcripts were "prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted." A. 150a.

The transcripts were in fact used for these purposes. According to Mr. Kissinger, "my executive secretary checked [the transcripts] periodically in order to prepare my appointment schedule and keep it current."

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[1] Tapes and stenographic notes used to prepare transcripts were destroyed immediately afterward. A. 153a, 244a.

A. 245a. The transcripts also facilitated the implementation of important decisions and enabled Mr. Kissinger's subordinates to take action on matters discussed over the phone. In Mr. Kissinger's words:

> "The notes were also read by my Senior Special Assistant so that he could keep abreast of my activities. This saved time, as it enabled him to know whether any matters I had discussed required follow-up or implementation without waiting for me to report the substance of my telephone conversations." *Id.*

There is evidence that transcripts of particular conversations were reviewed not only by Mr. Kissinger's immediate staff but by other government officials, including the President and some of his assistants.[2] There is also evidence that Mr. Kissinger edited particular transcripts before circulating them for review.[3]

State Department regulations and policies confirm the official functions which the transcripts served. Under Department regulations, "decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record." 5 Foreign Affairs Manual (FAM) § 423.2-1. Equally significant, when Mr. Kissinger was Secretary of State, the Department prohibited the monitoring of telephone conversations except when "deemed absolutely essential to the conduct of business." A. 123a. Thus, Mr. Kissinger could lawfully monitor and transcribe his telephone conversations only because these steps were necessary for the performance of his Department duties.

As a record of Mr. Kissinger's telephone conversations during each working day, the transcripts may reflect a few personal discussions between Mr. Kissinger and friends or family members.[4] However, the vast bulk of the transcripts provide a precise, contemporaneous account of Mr. Kissinger's official conversations—with "diplomats, government officials, two Presidents, scholars, [and] Congressmen"—as he conducted the foreign policy of the nation over an eight-year period. A. 245a.

B. The Safire FOIA Request

On January 12, 1976, Mr. Kissinger filed interrogatory answers in *Halperin* v. *Kissinger* (D.D.C.), a suit growing out of his activities as Assistant to the President. In these answers, Mr. Kissinger acknowledged that his telephone conversations between January 21, 1969 and February 12, 1971 had been monitored and

[2] In an affidavit filed in the district court, William Safire has recounted an incident in which the transcript of a conversation between Mr. Kissinger and a reporter was shown first to him (Mr. Safire was then a Special Assistant to the President) and later to Mr. Haldeman and the President himself. A. 175-181a. Mr. Kissinger purports not to recollect this incident. A. 191a.

[3] The Safire affidavit indicates that Mr. Kissinger edited the transcript of the conversation in question before circulating it to Mr. Haldeman and the President. A. 175a, 177a, 179a. Mr. Kissinger asserts that the transcripts were never edited. A. 246a.

[4] The record does not clearly indicate the extent to which the transcripts actually include personal conversations. In his interrogatory answers in *Halperin* v. *Kissinger*, Mr. Kissinger twice stressed that "[*b*]*usiness* telephone calls from my White House office were usually monitored by my personal secretaries . . ." A. 148a, 150a (emphasis added). Similarly, according to a story published in the *Washington Post* on December 28, 1976 (D15), Mr. Kissinger has said that, while many conversations relating to personal matters were monitored, only his business conversations were actually transcribed.

transcribed by White House secretaries. A. 148a-149a. The interrogatories did not ask about transcripts of Mr. Kissinger's telephone conversations since he had become Secretary of State, and Mr. Kissinger's answers did not refer to such transcripts.

On January 16, 1976, respondent William Safire submitted a Freedom of Information Act (FOIA) request to the Department of State. A. 49a-51a. Safire, a *New York Times* columnist, had been an assistant to President Nixon from 1969 to early 1973. Referring to Mr. Kissinger's interrogatory answers in *Halperin* v. *Kissinger,* he asked the Department to produce all transcripts of Mr. Kissinger's telephone conversations between January 21, 1969 and February 12, 1971 (1) in which his own name appeared or (2) in which Mr. Kissinger discussed the subject of "leaks" with certain named White House officials. A. 49a-50a.

Mr. Safire's FOIA request was denied in a letter dated February 11, 1976. According to that letter, the Department's Legal Adviser had concluded that the transcripts which he sought were not Department records "because of Dr. Kissinger's position at the time the documents were made." A. 169a. In addition, the letter asserted that these transcripts were in any event covered by various FOIA exemptions, including exemption 1 (which applies to classified information relating to national security).

Mr. Safire appealed the Department's denial of his request. A. 52a-55a. By a letter dated March 29, 1976, the Department informed Mr. Safire that his FOIA appeal had been decided adversely. A. 171a-173a. The letter indicated that the Department's Legal Adviser had again concluded that "documents which are originated in a White House office by a member of the President's immediate staff, such as the President's Special Assistant for National Security Affairs, are not subject to the Act." A.172a.[5] Nevertheless, the letter did not suggest that the transcripts were Mr. Kissinger's personal property, nor did it refer to transcripts of Mr. Kissinger's telephone conversations as Secretary of State.

C. The Removal of the Transcripts

On October 29, 1976, the transcripts were moved from the State Department to the New York estate of Nelson Rockefeller. A. 248a. Before taking this action, Mr. Kissinger did not consult the Department's Foreign Affairs Document and Reference Center (FADRC), which is responsible for implementing the Department's record maintenance and disposal program.[6] He also did not consult the National Archives and Records Service (NARS), a branch of the General Services Administration (GSA) which is responsible for records preservation throughout the federal government. Thus, Department record officers and NARS archivists had no opportunity to determine whether the transcripts were Department records, whether they

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[5] In contrast to the Department's initial denial, the Department's decision on appeal did not maintain that the transcripts contained classified information covered by FOIA exemption 1. According to the affidavit of the Department's Legal Adviser, the transcripts sought by Mr. Safire had been submitted to the Department's Council on Classification Policy, which determined that they did not contain classified information. A. 259a. Nevertheless, it should be noted that no such review ever took place with respect to the remaining transcripts, and there was never any determination that they also lacked classified information. *Id.*

[6] 5 FAM § 414.1.

contained classified information, or whether their preservation would aid the Department in performing its duties or serve long-range archival needs.

The only justification for the removal of the transcripts was contained in a memorandum prepared for Mr. Kissinger by the Department's Legal Adviser. A. 80a-84a. This memorandum was dated November 11, 1976, two weeks after the transcripts had been moved to the Rockefeller estate. It concluded that the transcripts were "essentially personal papers that [Mr. Kissinger is] entitled to retain when [he] leave[s] office." A. 80a. According to the memorandum, the transcripts had this status because Department of State regulations provide that a "retiring official may retain papers expressly designated or filed as personal from their time of origin or receipt." A. 81a. To support this proposition, the memorandum referred to 5 FAM § 417.1a, but neither quoted its language nor discussed its requirements. No other Department regulations were mentioned. As a "precaution", the memorandum urged Mr. Kissinger to prepare extracts of any "significant government activity or decision" recorded by the transcripts, but it suggested that this procedure was not required by Department regulations. A. 82a.

At the time of their transfer to the Rockefeller estate, there was no public announcement that the transcripts had left State Department custody. On November 11, 1976, two weeks after their removal, the *Washington Post* published an interview with a senior Department official. Without acknowledging that the transcripts had already left the Department, the official stated that the Department's Legal Adviser had concluded that they were " 'personal papers' which

may be taken with [Mr. Kissinger] when he leaves government." A. 86a. Mr. Kissinger was not scheduled to leave the State Department until January 20, 1977 and the official's remarks suggested that the transcripts would remain at the Department until his departure.

D. The First Agreement

On November 12, 1976, Mr. Kissinger entered into a Deed of Gift and Agreement (the "First Agreement") with the Librarian of Congress. A. 42a-46a. Under this Agreement, Mr. Kissinger promised to donate to the Library of Congress a collection of personal papers from his Harvard University period and government papers from his eight years in the Nixon and Ford Administrations. Paragraph 2 of the Agreement provides that the official materials in the collection will consist of "copies of government papers of which there is an original or record copy in government files." It also provides that all such materials must have been "approved for inclusion in the Collection" by "authorized officials."

Paragraphs 4 and 5 of the Agreement stipulate that public access to the collection will not begin until 25 years or 5 years from the death of Mr. Kissinger, whichever occurs later. Until that time, Paragraph 7 limits access to (1) employees of the Library of Congress who have been jointly approved by the Librarian of Congress and Mr. Kissinger; (2) persons who have received the written permission of Mr. Kissinger; and (3) after Mr. Kissinger's death, persons who have received the written permission of a committee to be named in his will. A. 44a. Under Paragraph 5, no government document can be disclosed to the public unless

the originating agency has determined that it contains no classified information. Paragraph 7 specifies that documents containing classified information may only be disclosed to persons with appropriate security clearances.[7]

In contrast to the barriers to public access which it creates are the privileges conferred by the Agreement on Mr. Kissinger himself. Paragraph 6 assures Mr. Kissinger unrestricted access to the collection during his lifetime. It also obligates the Library to provide Mr. Kissinger with working space where he can use the collection, and to make it available to all of his research assistants who have appropriate security clearances.

When the First Agreement was executed, a memorandum entitled "Donation Procedures" was prepared by the State Department to facilitate the transfer of government documents to the Library. A. 251a-257a. The memorandum stipulated that employees of the Department of State Document and Reference Center would review Mr. Kissinger's working files to insure that they did not contain any original or record copies of Department materials. When they found a document containing both personal and official matters, these employees were required to prepare "an extract of official contents . . . for inclusion in the Department's record system." A. 252a.

Appended to the "Donation Procedures" memorandum for Mr. Kissinger's signature was the Department's standard Separation Statement (Form JF-3). A. 255a-257a. This Statement required Mr. Kissinger to affirm that he had "surrendered to responsible offi-

[7] These restrictions on the dissemination of classified information do not apply to the "personal papers" in the collection.

cials . . . documents or material containing classified or administrative information furnished to me during the course of [government] employment or developed as a consequence thereof, including any diaries, memorandums of conversations, or other documents of a personal nature . . ." A. 255a. Mr. Kissinger also had to affirm that he had "surrendered to responsible officials *all* unclassified documents and papers relating to the official business of the Government . . ." A. 255a (emphasis added).

Mr. Kissinger's working files were reviewed by Department records officers pursuant to the "Donation Procedures" memorandum before their transfer to the Library. However, the transcripts of his telephone conversations remained at the Rockefeller estate and were never inspected by Department record officers. A. 247a. As a result, the Department's Document Center had no opportunity to assure that, in accordance with Mr. Kissinger's Separation Statement, all portions of the transcripts "relating to the official business of the Government" remained in Department files.

E. The Donation of the Transcripts

On December 24, 1976, Mr. Kissinger and the Librarian entered into a Second Deed of Gift and Agreement (the "Second Agreement"). A. 46a. Under this Agreement, executed nearly two months after the transcripts had been removed from the Department, Mr. Kissinger donated to the Library of Congress "additional personal papers consisting of the transcribed secretarial notes of his telephone conversations." The Second Agreement incorporates by reference all the

terms and conditions of the First Agreement.[8] It further provides that public access to the transcripts will be permitted only with the consent, or upon the death, of the other parties to the telephone conversations in question. Thus, unless Mr. Kissinger decides otherwise, the transcripts will be unavailable to the public until 25 years or 5 years from his death and that of the other parties to the conversation, whichever occurs later.

On December 28, 1976, the transcripts were transported directly to the Library from the Rockefeller estate. A. 249a. During the two months preceding this transfer, neither officials of the Department's Document Center nor NARS archivists received an opportunity to inspect the transcripts. Nevertheless, a number of weeks after they were moved to the Library, Lawrence M. Eagleburger, Mr. Kissinger's personal aide during most of his government service, extracted portions of the transcripts for inclusion in the files of the State Department and the National Security Council (NSC). A. 248a. In undertaking this task, Mr. Eagleburger was guided by the Department's Legal Adviser, who instructed him that these extracts should include "any significant policy decisions or actions not otherwise reflected in the Department's records." A. 259a.

F. The RCFP FOIA Requests

On December 28, 1976, the State Department announced that Mr. Kissinger was donating the transcripts of his telephone conversations to the Library

[8] Since the transcripts were classified as "personal papers" under the First Agreement, however, they are not subject to the First Agreement's safeguards against the disclosure of classified information to unauthorized persons.

of Congress. A. 167a. This announcement did not indicate that the transcripts had been moved to the Rockefeller estate two months earlier or that they were being deposited with the Library on the same day. On January 13, 1977, believing that at least some of the transcripts were still in Department custody, the Reporters Committee for Freedom of the Press and ten other organizations and individuals (collectively the "RCFP requesters") submitted an FOIA request to the Department.[9] A. 56a-60a. The requesters sought disclosure of the transcripts of Mr. Kissinger's conversations as both Special Assistant to the President and Secretary of State.[10] The RCFP request—which was filed a week before Mr. Kissinger resigned as Secretary of State—recited the requesters' understanding that portions of the transcripts were "still in the physical custody of the Department" and urged the Department not "to relinquish custody" until legal proceedings under the FOIA had been resolved. A. 57a-58a.

The Department denied the RCFP request in a letter of its Acting Legal Adviser dated January 28, 1977. A. 61a-63a. This letter advised the requesters that all of the transcripts had been delivered to the Library

[9] Another FOIA request was made by the Military Audit Project and its Director (collectively the "MAP requesters") in two letters dated December 28 and 29, 1976. A. 69a-72a. This request—which encompassed transcripts of telephone conversations and other materials generated while Mr. Kissinger was Secretary of State but not materials relating to his White House service—was denied on January 18, 1977. A. 73a. This denial was affirmed on administrative appeal on March 4, 1977. A. 78a-79a.

[10] The RCFP requesters also sought all "other materials that reflect, verbatim and substantially verbatim, the contents of the conversations, telephonic and otherwise, held by Henry Kissinger during his government service." A. 56a-57a. The Department denied this request as "unreasonably broad." A. 63a.

of Congress. Access under the FOIA, it asserted, could not be granted because the transcripts "are not agency records of the Department of State and are not in the custody or control of this Department." A.62a-63a. According to the letter, recourse to the Department's FOIA appeal procedures was unnecessary because the Department did not consider the transcripts its records. A. 63a.

G. The Archivist's Requests to Examine the Transcripts

Under the Federal Records Act of 1950[11] and the Records Disposal Act of 1943,[12] GSA is responsible for insuring that the agencies of the federal government observe uniform and effective records-maintenance policies. GSA's responsibility under these statutes has been delegated to the Archivist of the United States, who oversees the National Archives and Records Service. Upon learning of the donation of the transcripts to the Library of Congress, the Archivist questioned the legality of Mr. Kissinger's actions under the statutes which NARS administers.

In a letter to Mr. Kissinger dated January 4, 1977, the Archivist asked to inspect the transcripts so he could determine whether they were Department records which Mr. Kissinger had no authority to remove from Department custody.[13] A. 47a-48a. Mr. Kissinger rejected this request in a letter dated January 18, 1977,

[11] 44 U.S.C. §§ 2901-2909, 3101-3107.

[12] 44 U.S.C. §§ 3301-3314.

[13] The Archivist also sought to determine whether portions of the transcripts were materials of the Nixon Presidency, over which GSA had custody under the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 *note*.

and enclosed a new memorandum of the Department's Legal Adviser justifying his actions. A. 88a-97a. That memorandum reiterated that, under 5 FAM § 417.1, a departing Department official may remove any paper that he has designated "personal". A. 93a. The extracts of the transcripts that Mr. Eagleburger was preparing, the memorandum maintained, would be sufficient to satisfy Department regulations and government-wide records statutes. A. 93a-94a.[14] Finally, the memorandum suggested that GSA had an "advocate's interest" in establishing a broad definition of official "records" and, for this reason, could not conduct an impartial inspection of the transcripts. A. 95a.[15]

The Archivist renewed his request to inspect the transcripts in a letter dated February 11, 1977, which was accompanied by a lengthy legal opinion of the General Counsel of GSA. A. 99a-116a. That opinion analyzed pertinent provisions of the Federal Records and Records Disposal Acts and concluded that they "make it quite clear that every agency's head shall operate the agency's records management program in full cooperation with and under regulations prescribed by GSA." A. 105a. Pointing out that GSA had issued government-wide regulations concerning the character of "personal papers" over ten years earlier, the opinion stressed its recent determination that "[t]he definition of official records involves materials made or received either in pursuance of Federal law or in connection with the transaction of public business." A.

[14] The provisions of law which purported to support this position, however, were not analyzed or discussed.

[15] The memorandum did not discuss whether transcripts dating from Mr. Kissinger's White House period were covered by the Presidential Recordings and Materials Preservation Act.

106a-107a. Application of this criterion to the transcripts, the opinion determined, was a task which Congress had committed to NARS archivists.[16] A. 109a-111a. Finally, the opinion emphasized that, under the federal records statutes, "a federal official may not conclusively establish a document as a personal paper, although its subject matter relates to official business, by merely designating it as personal . . . ." A. 112a.[17]

Mr. Kissinger did not respond to the Archivist's second request to inspect the transcripts.

H. Proceedings in the District Court

On February 8, 1977, the RCFP requesters (joined later by William Safire) filed suit in the District Court for the District of Columbia. A similar but more narrow suit was filed by the MAP requesters on March 8, 1977.[18] The two suits were consolidated on June 20, 1977. A. 3a. Named as defendants were the Department

[16] Under 44 U.S.C. § 2906(a)(1), GSA may inspect the records of any federal agency to ascertain the adequacy of its records-maintenance practices.

[17] The GSA legal memorandum also pointed out that the State Department's Legal Adviser had erroneously relied on an oral opinion of the Justice Department's Office of Legal Counsel that the transcripts were not federal records. In fact, the GSA memorandum explained, the opinion rendered by the Justice Department related to the Safire FOIA request for certain transcripts dating from Mr. Kissinger's White House period and rested on the rationale that the President and his immediate advisers were exempt from the FOIA. No judgment was requested or reached concerning the status of transcripts produced while Mr. Kissinger was Secretary of State. A. 115a.

[18] The RCFP Complaint sought access to the transcripts of Mr. Kissinger's telephone conversations as both Secretary of State and Assistant to the President, whereas the MAP suit was limited to transcripts from his State Department period.

of State and its present Secretary, the Library of Congress and the Librarian, Mr. Kissinger and the Archivist.

The RCFP plaintiffs included professional organizations of historians, political scientists and journalists and nine prominent scholars and writers.[19] Without access to the transcripts, they contended, the ability of scholars and journalists to analyze the Nixon and Ford presidencies would be severely hampered—particularly if Mr. Kissinger could use the transcripts in preparing accounts of his government service while they were unavailable to the public.[20] Plaintiffs' Complaints invoked the FOIA, the Federal Records Act, the Administrative Procedure Act and the federal mandamus statute. A. 23a, 34a-35a. They asked the court to declare that the transcripts had been unlawfully removed from the State Department and remained its "records" despite their present location. As ultimate relief, plaintiffs requested that the court require the Library to return the transcripts to the Department with directions to process them for disclosure under the FOIA. A. 40a-41a.

Cross-motions for summary judgment were filed by both sets of plaintiffs and Mr. Kissinger. The govern-

[19] In addition to the Reporters Committee, plaintiffs included the American Historical Association, the American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald Herzberg, William Leuchtenberg, Arthur Link, J. Anthony Lukas, Austin Ranney, Clement Vose and William Safire.

Plaintiffs' contentions that the transcripts were essential to evaluating the Nixon and Ford presidencies were later documented in affidavits filed with the district court. A. 280a-290a.

[20] Newspaper reports have indicated that Mr. Kissinger has signed contracts for his memoirs worth over $2 million and that the memoirs may be published in late 1979. A. 156a-157a, 192a.

ment defendants initially opposed these motions and sought a court order which would have allowed GSA and State Department archivists to inspect the transcripts. JA 190-92.[21] Subsequently, however, the government defendants and Mr. Kissinger entered into a voluntary agreement which provided for a limited inspection of the transcripts. The government thereupon withdrew its opposition to the pending cross-motions.[22] JA 274-279. Nevertheless, it did not concede that the transcripts were no longer State Department records, that Mr. Kissinger's interpretation of Department regulations was correct, or that his removal of the transcripts from Department custody had been lawful.

On December 8, 1977, Judge Smith ruled on the cross-motions for summary judgment, deciding in plaintiffs' favor as to transcripts produced while Mr. Kissinger was Secretary of State, but denying relief as to transcripts of Mr. Kissinger's conversations as Special Assistant to the President. In its opinion, the district court emphasized that "State Department regulations require documentation of all official activities", including telephone conversations, and that Department policy "prohibits monitoring of telephone conversations except when 'absolutely essential to the conduct of business'." Pet. App. 56a.[23] The court also pointed out that "under his own regulations, Dr. Kissinger had no alternative but to document the matters discussed in the conversations", and that the "significance of the commitments, decisions, and discussions

[21] "JA" refers to the joint appendix in the court of appeals.

[22] The RCFP requesters are unaware of whether this inspection has been completed and, if so, what its outcome has been.

[23] "Pet. App." refers to the Appendix to Mr. Kissinger's petition for certiorari.

embodied in these conversations is apparent from the stature of the other parties to them (two presidents, heads of State, Cabinet Officers, diplomats, legislators, scholars, journalists and others) . . . ." *Id.* Finally, the court emphasized that the transcripts "were produced not only in accordance with Department regulations but also on government time and with the aid of department employees, equipment, materials, and other public resources." Pet. App. 58a.

To analyze the significance of these facts, the court invoked a substantial line of cases holding that, in both the private and governmental sphere, "work created by an employee within the scope of employment is the property of the employer." Pet. App. 56a. Based on this principle, the court then held that, "[h]aving been prepared and transcribed 'in the discharge of [Mr. Kissinger's] official duties', the notes [were] property" of the Department of State. Pet. App. 58a. The preparation of extracts, the court concluded, did not transform the original transcripts into personal papers because Department regulations do "not permit agency employees to extract personal matters from official correspondence and to then treat the correspondence as personal." Pet. App. 58a n.12. Nor did Department regulations permit Mr. Kissinger to treat the transcripts as his own property merely because he had designated them "personal" when they were prepared. As the court found, 5 FAM § 432 only permits "personal" designation for "[p]apers . . . which pertain only to an individual's private affairs." Pet. App. 55a-56a n.9.

Under the Federal Records Act, the court determined, records may be removed from an agency only if it has listed them in a schedule submitted to GSA

and GSA has concurred in their disposal. Pet. App. 54a. The transcripts had never undergone this procedure, the court reasoned, and therefore retained their status as Department "records". Recognizing that the transcripts would be subject to the FOIA if they were still stored on Department premises, the court held that they were not immunized from disclosure merely because they were no longer in the Department's actual custody. Rather, it determined, when an agency has taken no action to retrieve unlawfully removed records, a court could exercise its "broad equitable powers" under the FOIA to return those records to agency possession. Pet. App. 55a.

The district court devoted little attention to the transcripts of Mr. Kissinger's conversations as Special Assistant to the President. Referring to these transcripts only in passing, the court commented—mistakenly it turned out [24]—that plaintiffs had withdrawn their claim to them at oral argument and further consideration of their status was unnecessary.

On January 25, 1978, Judge Smith issued an order implementing his opinion. Pet. App. 59a-61a. The order directs that the transcripts of Mr. Kissinger's

[24] According to the transcript of the oral argument, such a concession was made by counsel for MAP requesters, who had never sought the White House transcripts in their Complaint, but not by the RCFP requesters, who had expressly sought access to the White House transcripts in their Complaint (A. 22a) and briefed their entitlement to them at length in their summary judgment papers. A. 265a-267a. Although the RCFP requesters brought this error to the attention of the lower court and sought clarification of its opinion, Judge Smith's order of January 25, 1978 denied plaintiffs' summary judgment motion with respect to the White House transcripts. Pet. App. 60a. The court of appeals apparently recognized the lower court's error and considered the status of the White House transcripts on its merits. Pet. App. 49a.

conversations as Secretary of State are to be returned to the Department, which must then review them to determine which are subject to mandatory disclosure and which may be withheld under the FOIA's exemptions. After the Department has identified the portions of the transcripts which it will disclose, these transcripts must be inspected by Mr. Kissinger. No transcripts can be released to the public until he has had an opportunity to ask the district court to restrain disclosure on the basis of FOIA exemption (b)(6), which applies to agency records whose release would "constitute a clearly unwarranted invasion of personal privacy." [25]

Implementation of Judge Smith's order was subsequently stayed.[26]

I. Proceedings in the Court of Appeals

Mr. Kissinger, but not the government defendants, appealed from the district court's order to the court of appeals.[27] On November 7, 1978, the court issued a

[25] In its Brief, the government has asserted that, under this Court's opinion in *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), Mr. Kissinger lacks standing under the FOIA to object to the disclosure of documents that the Department has not chosen to withhold under an FOIA exemption. Brief for the Federal Parties (hereafter "Gov. Br.") 16 n.12. If this Court upholds the other provisions of the lower court's order, the propriety of this procedure can be considered on remand.

[26] This Court issued a stay on April 24, 1978, 435 U.S. 993, pending the completion of proceedings in the court of appeals. Subsequently, the court of appeals stayed its mandate pending the completion of proceedings in this Court.

[27] In the court of appeals, the government chose to participate as an *amicus curiae* and presented a legal analysis which, if accepted, would have required the case to be remanded for further proceedings.

per curiam judgment affirming the decision of the district court. Pet. App. 47a-50a. In a brief accompanying memorandum, the court stated that, because the government had not appealed, "a judgment affirming the District Court on the ownership issue may make consideration of most of the other issues Mr. Kissinger raises unnecessary." Nevertheless, the court emphasized that it was "in full agreement on all issues" with the decision of the district court. Pet. App. 49a.

Acknowledging that the district court may have misconstrued cross-petitioners' position regarding the White House transcripts, the court nevertheless determined that the result which it reached was correct. Pet. App. 49a. Three considerations, it indicated, supported this conclusion: (1) the FOIA does not cover those Presidential advisers "who are so close to him as to be within the White House"; (2) the relocation of the transcripts to the State Department did not bring them within its disclosure responsibilities under the FOIA; and (3) the fact that portions of the transcripts may reflect the affairs of the NSC, an agency to which the FOIA does apply, provided no basis for disclosure in the absence of an FOIA request directed to that agency. Pet. App. 49a-50a.

SUMMARY OF ARGUMENT

The transcripts of Mr. Kissinger's telephone conversation were prepared to aid him in performing his government duties during his eight years as Assistant to the President and Secretary of State. They contain a detailed, often verbatim account of the transaction of important government business by Mr. Kissinger and the many foreign and domestic leaders with whom

he spoke. As a daily record of the activities of America's leading diplomat during a period of great national controversy, the transcripts represent a collection of first-hand materials on foreign and domestic policy that is invaluable. Few documents can contribute more substantially to the central goal of the Freedom of Information Act—to promote public understanding of significant government decisions and actions.

Since late 1976, however, the transcripts have been unavailable to the public as well as to officials of the present Administration. Asserting that they were his "private papers," Mr. Kissinger removed the transcripts from State Department custody under conditions of unusual secrecy and then arranged for their "donation" to the Library of Congress. The Agreement governing that "donation" allows Mr. Kissinger full use of the transcripts and authorizes him to forbid access by all others. Thus, the transcripts are now held on terms which frustrate the objectives of the FOIA.

The lower courts required the return of the transcripts to the State Department and directed the Department to review and process them in accordance with the FOIA. In granting this relief, the courts made two determinations: (1) the transcripts are "records" of the Department of State, not "private papers", and Mr. Kissinger could not lawfully remove them from Department custody; and (2) since they remain Department "records" in every respect except location, the transcripts were not immunized from the FOIA by their removal from the Department but can be returned to it for FOIA review and disclosure. Both of these holdings are plainly correct.

I.

A long line of decisions embodies the principle that documents created during a government employee's official duties are public property which the government, not the individual employee, controls. When Congress adopted the Records Disposal and Federal Records Acts, it did not abandon this principle. Rather, it created a mechanism for records disposal which seeks to assure that no document which reflects public business is removed from agency custody until the originating agency and GSA, applying uniform criteria, have determined that the document should not be preserved. To implement this scheme, 44 U.S.C. § 3301 defines "records" in broad terms that reach all documents which are "appropriate for preservation" as evidence of an agency's activities and operations. This broad definition of "records" is embodied in the Presidential Records Act of 1978, a statute which seeks to put presidential records on the same footing as all other records of the Executive Branch. While there is a narrow class of "non-record materials" that does not fall within 44 U.S.C. § 3301, the defining characteristic of these materials is that they are so devoid of value as evidence of agency affairs that they are not "appropriate for preservation" under the statutory standard. No agency has discretion to reclassify a document which *does* have such evidentiary value as a "non-record."

GSA, which has government-wide responsibility for implementing the records statutes, has interpreted 44 U.S.C. § 3301 to encompass any document "relevant to the conduct of official business." GSA's concept of "records" is incorporated in the procedures and policies of virtually every federal agency. The State Department is no exception. The Department's regulations permit employees to retain documents which pertain only to their private affairs, and even personal documents may not be removed if they contain classified information. Moreover, when a document is properly designated personal, the employee must still extract *all* official information for inclusion in Department files.

Thus, in accordance with statutory requirements and GSA regulations, the Department treats materials (like the transcripts) which relate to Department business as "records" which can only be disposed of in accordance with the statutory procedures for records disposition. Because the transcripts were removed from Department custody without adherence to these procedures, their removal was unlawful and the transcripts have never ceased to be Department "records."

II.

As Department "records", the transcripts would be subject to the FOIA if requesters had sought their disclosure while they were still in Department custody. The unlawful removal of the transcripts from the Department a few weeks before those requests were filed did not change their status under the FOIA. The Act's broad disclosure requirement applies to *all* "records", wherever located. 5 U.S.C. § 552(a)(3). There is no exemption in the statute for "records" that happen to be outside the agency's physical custody at the time an FOIA request is made. Moreover, records that an agency owns and legally controls can clearly be described as "withheld" under 5 U.S.C. § 552(a)(4)(B) even if they are not stored on agency premises.

When an agency fails to produce such records, it is thus "withholding" them in violation of the Act and the courts have jurisdiction to require an appropriate remedy.

The legislative history of the FOIA reinforces the natural meaning of the statutory language. The FOIA was enacted to achieve the broadest possible disclosure of information about government activities, subject only to nine narrowly drawn exemptions. If the Act did not apply to unlawfully removed records, government officials would be free to suppress sensitive or embarrassing documents simply by removing them from the physical custody of the originating agency or transferring them to a branch of government to which the Act does not apply. The policy of broad disclosure that the FOIA embodies would be frustrated if such changes in the physical location of records immunized them from the Act.

Under *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), the district courts may utilize their broad equitable powers to remedy violations of the FOIA. Thus, once it determined that the transcripts were Department "records", the district court was empowered to order the Department to repossess and process them under the Act. Use of the FOIA to recover wrongfully removed records will promote, not weaken, the policies of the Federal Records Act by aiding the government in preserving valuable records for public use and disclosure. Moreover, under the decisions below, the FOIA only applies to unlawfully removed records, not to records removed in accordance with the statutory procedures for records disposition. Thus, the vast bulk of government documents removed from agency custody would not be

reachable by an FOIA request, and the courts would not intrude into legitimate agency recordkeeping activities.

III.

The lower courts erred in refusing to return the White House transcripts to the State Department for FOIA review and disclosure. These transcripts also record the transaction of official business, were prepared to facilitate the performance of Mr. Kissinger's governmental duties, and were removed from the Department without adherence to the statutory procedures for records disposition. It is no objection to the production of these transcripts under the FOIA that they originated at the White House, not the Department of State. An agency that controls records of government business is not relieved from complying with the FOIA merely because those records were created elsewhere in the government. While records of the White House Office of the President may be immune from the FOIA if they remain in the President's custody, the transcripts were transferred to the State Department and the President failed to exercise any further control over their use. Moreover, a sizable portion of the White House transcripts reflects Mr. Kissinger's duties as head of the NSC, rather than as an advisor of the President. The NSC is part of the Executive Office of the President and is therefore an "agency" subject to the FOIA. 5 U.S.C. § 552(e). For this reason, transcripts of conversations in which Mr. Kissinger was directing the affairs of the NSC were "records" covered by the Act when they were held at the White House, and the Department became obligated to produce them when they were transferred into its custody.

IV.

The district court's order does not violate Mr. Kissinger's privacy rights under the Constitution. Under many decisions of this Court, including *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), no right of privacy attaches to documents relating to public business. It is true that the district court's order directs Department officials to review transcripts of personal conversations in order to segregate the much larger number of transcripts concerning government affairs. However, this procedure is necessitated by Mr. Kissinger's own practice of monitoring business and personal conversations indiscriminately and is the only way to assure that all business-related transcripts are screened for FOIA disclosure. Thus, the district court's order represents the least intrusive means of affording requesters the relief under the FOIA to which they are entitled.

ARGUMENT

I.

THE TRANSCRIPTS ARE "RECORDS" OF THE DEPARTMENT OF STATE WHICH MR. KISSINGER REMOVED UNLAWFULLY FROM DEPARTMENT CUSTODY

The basic premise underlying Mr. Kissinger's removal of the transcripts from State Department custody is that they were not Department records but personal papers over which he could exercise sole control. This premise, however, is contradicted by the character and uses of the transcripts. The transcripts do not reflect Mr. Kissinger's private ruminations about foreign and domestic policy. Instead, they record, often in meticulous detail, the transaction of important government business by Mr. Kissinger and major foreign and domestic leaders. Moreover, the transcripts were not prepared as a private diary of Mr. Kissinger's activities. Their express function was to facilitate the performance of his official duties, and they were in fact used by Mr. Kissinger and his aides for this very purpose.

Because of these factors, the status of the transcripts is controlled by the basic doctrine that materials created in the course of a government employee's official duties belong to the government agency for which they were produced, not the individual employee. This doctrine is reflected in a large body of case law. It is also reflected in the statutory provisions, administrative regulations and actual practices which govern the use and disposal of records by the Department of State and other federal agencies.

At 44 U.S.C. § 3301, the Federal Records Act of 1950 defines "records" in broad terms that encompass any document which is "appropriate for preservation" as evidence of the official business of a federal agency. This broad definition was recently reaffirmed by Congress in the Presidential Records Act of 1978, a statute enacted to insure that all presidential materials are screened by the Archivist before they are removed or destroyed. Authority to implement 44 U.S.C. § 3301 resides with GSA, which promulgates regulations that control records-maintenance practices throughout the federal government. Significantly, GSA has determined that official "records" include all documents "relevant to the conduct of public business"—a principle which virtually all federal agencies have consistently observed.

As the Government suggests, the statutory definition of "records" excludes a small category of "non-record materials" prepared as part of a government employee's official duties. Individual agencies, however, do not have broad discretion to classify official documents as "non-record materials." Rather, such materials consist solely of uncirculated notes, working drafts, office directories and similar documents which are wholly ministerial in nature or represent the personal work product of the employee. These documents do not provide direct evidence of an agency's substantive activities and cannot be considered "appropriate for preservation" within the meaning of 44 U.S.C. § 3301. The transcripts, by contrast, were prepared to document the actual transaction of important agency business and clearly qualify as "records" under the statutory definition.

The broad definition of "records" in 44 U.S.C. § 3301 is embodied in State Department regulations. The Department permits employees to retain only those documents which relate to their private affairs. Moreover, echoing government-wide policies established by Executive Order, the Department forbids employees from retaining *any* document (official or personal) which contains classified information. Under Department regulations, the preparation of "extracts" cannot transform Department records into personal papers. Extracting is only permitted for documents that are predominantly personal in character. In addition, the Department requires extracts to include *all* portions of a document that relate to agency business. Since the extracts of the transcripts which Mr. Eagleburger prepared omitted a substantial amount of official information, the original transcripts should have remained in Department files even if extracting was permissible to start with.

Once a document is a "record" under 44 U.S.C. § 3301, it can only be removed or destroyed in accordance with the provisions of the Records Disposal Act governing records disposition. Under these provisions, the originating agency must determine, and GSA must concur, that the document is not needed to transact current business and does not have sufficient archival value to warrant permanent preservation. 44 U.S.C. § 3303. When the transcripts of Mr. Kissinger's telephone conversations were removed from the State Department, this careful screening process was ignored. The transcripts were never reviewed by Department records officers, never listed in a records disposal schedule submitted to GSA, and never examined by NARS archivists. As a result, neither the Department nor GSA made the required finding that the transcripts lacked "sufficient administrative, legal, research or other value to warrant further preservation." 44 U.S.C. § 3303. Under these circumstances, Mr. Kissinger's removal of the transcripts from Department custody was unlawful, and the transcripts have never ceased to be Department "records."

A. Case Law Establishes That the Transcripts Are Property of the Department of State

It is well-established that an employer is presumed to be the owner of a work created by his employees within the scope of their employment. This principle has been applied in numerous cases involving the property rights of private employees. *E.g., Scherr* v. *Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied,* 397 U.S. 936 (1970); *Brattleboro Publish-*

ing Co. v. *Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966); *Nelson* v. *Radio Corporation of America*, 148 F.Supp. 1, 3 (S.D.Fla. 1957). The considerations underlying these cases apply with special force to public employment, where the work product of employees may often have major significance for society as a whole. Accordingly, "[a]ll of the decided cases, both federal and state, hold that where records are produced by a public official or a public employee as part of his governmental activity, with the assistance of other governmental employees, the use of governmental machines and supplies, and on government time, they are public records and belong to the government."[28]

In an 1874 decision, the Virginia Supreme Court of Appeals described the legal status of documents created by a government employee in the following terms:

> "Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, *whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the citizen, and is in no sense a private memorandum.*" *Coleman* v. *Commonwealth*, 66 Va. (25 Gratten) 865, 881 (1874) (emphasis added).

Numerous cases have applied these principles. For example, *United States* v. *First Trust Co. of St. Paul*,

[28] National Study Commission on Records and Documents of Federal Officials (hereafter "National Commission"), *Memoranda of Law* 3 (1976).

All of the parties in this case have referred in their briefs to various documents prepared by the National Commission. For the Court's convenience, we intend to lodge copies of these documents with the clerk before oral argument.

251 F.2d 686 (8th Cir. 1958), involved the ownership of rough notes prepared by William Clark during the Lewis and Clark expedition to aid him in writing his private diary. The court reasoned that "[i]f Clark's notes are the written records of a government officer executed in the discharge of his official duties, they are public documents and ownership is in the United States." 251 F.2d at 688. Holding that the notes were the property of Clark, the court emphasized that they were not intended to be used for any official function and were prepared merely as background for Clark's private account of the expedition. For these reasons, the court concluded, the notes were not the "work product of a government representative engaged in the performance of his duties." 251 F.2d at 690.[29]

Identical reasoning was employed in *Sawyer* v. *Crowell Pub. Co.*, 46 F.Supp. 471 (S.D.N.Y. 1942), *aff'd.* 142 F.2d 497 (2d Cir.), *cert. denied*, 323 U.S. 735 (1944), where the court held that a map created by Department of the Interior employees was government property. The court based its decision on the general rule that, "when an employee creates some-

[29] The general rule in the private sector is that "[c]orporate books and records are the property of the corporation and not of the officers or directors or stockholders. . . ." Fletcher, *Cyclopedia of the Law of Private Corporations* § 2192 at 636 (rev. perm. ed. 1976) (footnote omitted). *See also McElree* v. *Darlington*, 187 Pa. 593, 595, 41 A. 456 (1898). The courts have frequently granted equitable relief, including mandamus, to prevent retiring corporate officials from expropriating corporate books and records. *E.g.*, *Martin* v. *Carl*, 213 Md. 564, 132 A.2d 601 (1957); *Nancy Lee Mines, Inc.* v. *Harrison*, 93 Idaho 652, 471 P.2d 39 (1970); *State ex rel. Immanuel Presbyterian Church* v. *Riedy*, 50 La. Ann. 258, 23 So. 327 (Sup. Ct. 1898); *State ex rel. Cooper Butte Mines* v. *Guertin*, 106 Minn. 248, 119 N.W. 43 (1909); *People ex rel. Keeseville, A.C. & L.C.R.R.* v. *Powers*, 145 App. Div. 693, 130 N.Y.S. 529 (1911).

thing in connection with his duties under his employment, the thing created is the property of the employer." 46 F.Supp. at 473.[30] In determining that the map was not owned by the employees, the court emphasized that it was generally related to the employees' work, it was prepared on government time and with government resources, and the employees had not received any compensation for their efforts apart from their government salaries. *Id.*

The same approach is embodied in *Public Affairs Associates, Inc.* v. *Rickover,* 268 F.Supp. 444 (D.D.C. 1967), where Admiral Rickover sought to prevent the publication of certain speeches without his permission on the ground that they were his own property. After

[30] A similar rule has been consistently applied to inventions and scientific discoveries which grow out of government employment. As this Court stated the general rule in *Solomons* v. *United States,* 137 U.S. 342, 346 (1890):

> "If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer."

Elaborating on this approach is *Houghton* v. *United States,* 23 F.2d 386, 391 (4th Cir.), *cert. denied,* 277 U.S. 592 (1928), where a chemist employed by the Public Health Service unsuccessfully sought to maintain a patent on a fumigant gas to which the government claimed title. As the court said:

> "The Public Health Service represents the people of the United States. Its interest is their interest. Its investigations and discoveries are made for their benefit. . . . It is unthinkable that, where a valuable instrument in the war against disease is developed by a public agency through the use of public funds, the public servants employed in its production should be allowed to monopolize it for private gain . . . ."

Numerous other cases have reaffirmed this approach. *E.g., Mine Safety Appliances Co* v. *United States,* 364 F.2d 385, 391 (Ct. Cl. 1966); *Technitrol, Inc.* v. *United States,* 440 F.2d 1362, 1372 (Ct. Cl. 1971); *Jacobs* v. *United States,* 239 F.2d 459 (4th Cir. 1956), *cert. denied,* 353 U.S. 904 (1957).

the district court and the court of appeals had decided the case on narrow grounds of copyright law,[31] this Court granted certiorari and, in remanding for further proceedings, emphasized that the case presented

> "matters of serious public concern. They relate to claims to intellectual property arising out of public employment. They thus raise questions touching the responsibilities and immunities of those engaged in public service, particularly high officers, and the rightful demands of the government and the public upon those serving it." *Public Affairs Associates, Inc.* v. *Rickover,* 369 U.S. 111, 112-113 (1962).

The Court directed the district court to determine "the circumstances of the preparation and of the delivery of the speeches in controversy in relation to the Vice-Admiral's official duties." *Id.* at 113. Obeying this directive, the court held on remand that "[t]he fundamental determination . . . is whether the disputed speeches fall within the purview of Admiral Rickover's official duties." 268 F.Supp. at 448 (citations and footnotes omitted), and "[i]n this context, the duties of a high Government official should not be narrowly interpreted." 268 F.Supp. at 448-49. Applying this test, the court ultimately upheld the Admiral's claim of ownership only because the "speeches were handled as private business from start to finish." 268 F.Supp. at 449.[32]

[31] 177 F.Supp. 601 (D.D.C. 1959), *rev'd and remanded,* 284 F.2d 262 (D.C. Cir. 1960).

[32] As the court emphasized, the speeches were written at the Admiral's home during his leisure time, he was not on duty or acting as a government representative when giving the speeches, they were delivered before private audiences, and the speeches purported to reflect Admiral Rickover's personal views, not official government policy, and often covered topics unrelated to his government responsibilities. 268 F.Supp. at 449.

Most recently, in a case involving the materials of Richard Nixon's presidency, the District Court for the District of Columbia reaffirmed the "general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the official." *Nixon* v. *Sampson,* 389 F.Supp. 107, 133 (D.D.C. 1975), *stayed sub nom. Nixon* v. *Richey,* 513 F.2d 430 (D.C. Cir. 1975), *dismissed as moot,* 437 F.Supp. 654 (D.D.C. 1977), *rev'd and remanded,* No. 77-2123 (D.C. Cir. December 21, 1978). Significantly, the materials that the court held were government property included memoranda of conversations between the former President and foreign heads of state and records of conversations between Mr. Nixon and his aides. 380 F.Supp. at 132-133 nn. 71-72.

Under these decisions, the transcripts of Mr. Kissinger's telephone conversations must be considered Department property rather than private papers. The transcripts were produced by government employees on government time and with government equipment; under Department policy, the monitoring of telephone conversations conducted by these employees was permissible only when essential for the conduct of official business. In addition, the express purpose for the creation of the transcripts was to assist an important government official in performing his official duties. Most importantly, the transcripts represent Mr. Kissinger's conversations on official business—with foreign diplomats, other officials of the Executive Branch concerned with foreign policy, two Presidents, fellow Cabinet members, and members of Congress—

while conducting America's foreign policy for eight years. It is impossible to imagine conversations which more directly reflect the official business of the nation.

B. Under the Federal Records Act and State Department Regulations, the Transcripts Are "Records", Not "Non-Record Materials"

The Government acknowledges that the transcripts were government property, not private papers, throughout Mr. Kissinger's tenure as Secretary of State. It suggests, however, that there is a class of documents called "non-record materials" which are produced in connection with an employee's government duties but do not qualify as "records" under the federal records statutes. While these documents are owned by the originating agency, the Government contends that they are not subject to the records disposition procedures in Chapter 31 of 44 U.S.C., and thus can be removed by individual employees in the agency's discretion. Gov. Br. 39-42.

We agree that a limited category of non-personal documents created by government employees cannot be defined as "records" under 44 U.S.C. § 3301. The transcripts, however, clearly must be classified as "records" for two separate reasons. First, the definition of "records" in 44 U.S.C. § 3301 is extremely broad and includes all documents which are "appropriate for preservation" as evidence of agency activities and functions. The only materials that the definition excludes are documents that have so little value as evidence of government business that they are not "appropriate for preservation" under any possible standard. Second, even if the State Department could have classified the transcripts as "non-record materials", it did not do so. Instead, Department regulations provide

that *all* documents which reflect Department functions are "records" and must remain in its files when individual employees retire.

1. The Federal Records Act Defines "Record" as any Document Which May Provide Evidence of Agency Activities and Functions

The Records Disposal and Federal Records Acts establish a comprehensive system of records management for the entire federal government. The objectives of this system include "accurate and complete documentation of the policies and transactions of the Federal Government", "judicious preservation and disposal of records", and "[d]irection of continuing attention on records from their initial creation to their final disposition." 44 U.S.C. § 2902.

The Records Disposal Act prescribes detailed procedures for disposing of "records." 44 U.S.C. § 3303 specifies that, in accordance with regulations issued by GSA, an agency may propose records for disposal when it determines that they are not needed "in the transaction of its current business" and do not have "sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." The agency must then list these records in a schedule submitted to GSA. Under 44 U.S.C. § 3303a, GSA may authorize the agency to dispose of the records if it concurs that they lack governmental or historical importance. However, if GSA disagrees with the agency and concludes that the records should be preserved, they will be stored in the facilities of the National Archives system, established by 44 U.S.C. §§ 2903, 2907, where they will remain available to meet the needs of the government and the general public. Congress specifically prohibited the removal of records except in accordance with these procedures. Under 44 U.S.C. § 3314, "[t]he procedures prescribed by this chapter are exclusive, and records of the United States government may not be alienated or destroyed except under this chapter."

The objective of this statutory scheme is to insure that no "records" are destroyed or surrendered to private citizens unless the originating agency and GSA, applying uniform criteria, have concluded that their preservation will not benefit the government or the public. As stated in the legislative history of the Records Disposal Act's predecessor statute, Congress sought to "provide a clearly defined, simple, uniform and exclusive procedure for disposing of records of the United States Government that are not needed in the transaction of current business and that appear to have no permanent value or historical interest." [33] The central role of this review process in the total statutory scheme suggests the need for a broad definition of "record." If a document is not a "record," the statutory disposal procedures will not apply, and the document could be removed without undergoing the careful screening by the originating agency and GSA which Congress mandated.

To determine the proper definition of "record", four sources are relevant: (1) 44 U.S.C. § 3301, where Congress has defined the term; (2) the recently enacted Presidential Records Act of 1978, which creates pro-

[33] H.R. Rep. No. 838, 76th Cong., 1st Sess. 1-2 (1939). This Report relates to H.R. 6585 which, as enacted, became the General Disposal Act of 1939 (Pub. L. No. 295, 53 Stat. 1219). This Act was the first Congressional attempt in this century to create a comprehensive approach to records management. Like later statutes, it assigns the Archivist a central role in the records disposal process.

cedures for disposing of official materials created by the President and his aides; (3) the regulations of GSA, which is charged with implementing the records statutes; and (4) the practices and policies which federal agencies have adopted in response to statutory and GSA requirements. Each of these sources demonstrates that a document must be considered a "record" subject to statutory disposal procedures unless it has no conceivable value as evidence of government activities and operations.

a. 44 U.S.C. § 3301

At 44 U.S.C. § 3301, the Federal Records Act defines "records" of the United States to include:

> "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government . . . *in connection with the transaction of public business and preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government* or because of the informational value of data in them" (emphasis added).

The thrust of this provision is to establish an expansive definition of "records" that will have government-wide application. Under the definition, documents which originate "in connection with the transaction of public business" will be considered "records" if they are "preserved or appropriate for preservation" as evidence of government "policies, decisions, procedures, operations or other activities." This wording is comprehensive and reaches *all* documents which are prepared for official purposes and may be of value in documenting the workings of the government.

Mr. Kissinger and the Government point to the phrase "preserved or appropriate for preservation" in 44 U.S.C. § 3301 and argue that individual agencies have discretion to determine which documents relating to official business will have the status of "records."[34] Brief for Petitioner and Cross-Respondent Henry A. Kissinger (hereafter "Kiss. Br.") 33-34; Gov. Br. 39-41. However, these words simply do not have the meaning which Mr. Kissinger and the Government assert. Nowhere do they state or imply that individual agencies have broad authority to decide when an official document will become a "record";[35] indeed, 44 U.S.C. § 3301 does not mention the authority of individual agencies at all.

There is a more natural reading of the phrase "preserved or appropriate for preservation" which Mr. Kissinger and the Government do not discuss. Under this reading, the statutory definition would encompass

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[34] The Government and Mr. Kissinger also rely on 44 U.S.C. §§ 3101 and 3102 to support this argument. Under these provisions, individual agencies are responsible for creating "records containing adequate and proper documentation" of the agency's activities and for conducting an "active, continuing program for the economical and efficient management" of the agency's records, including "effective controls over the creation and over the maintenance and use of records in the conduct of current business."

These provisions authorize agencies to exercise discretion in determining when records will be created, how they will be used, and under what circumstances they will be proposed for disposal. Nowhere do they suggest, however, that, once a document relating to agency business has been created, an agency is free to determine that it is not a "record" within the meaning of 44 U.S.C. § 3301.

[35] Such language would not have been hard to draft. Congress could, for instance, have defined records as "documents which an agency has decided to preserve." Such language would have explicitly recognized the power of agencies to classify official documents as "records" or "non-records."

both documents that the agency has specifically decided to retain (*i.e.*, has "preserved") and documents that are potentially worthy of retention (*i.e.*, are "appropriate for preservation") because they provide evidence of the functions, policies or operations of the originating agency. Thus, the effect of the statutory language would be to reach documents that the agency has affirmatively included in its files as well as documents that may have a less formal status under agency regulations but still are of value in documenting the agency's affairs.[36] Under this approach, if a document originates in connection with public business and can shed light on an agency's activities, it would be "appropriate for preservation" as evidence of the agency's operations and would qualify as a "record" within the meaning of 44 U.S.C. § 3301. Since such a document would have potential archival significance, its "record" status would fulfill the objectives of the records statutes; the document would be subject to statutory disposal procedures and GSA would have an opportunity to decide whether it should be permanently retained.

This reading of 44 U.S.C. § 3301 does not mean that every single document created by government employees must be considered a "record." There are many official documents that are so clearly lacking in value

[36] Consistent with this approach, GSA's General Counsel has indicated that a document's status as a "record" does not depend on whether its creation was specifically mandated by statute or regulation:

> "[W]e call into question the significance of the fact that no statute mandated [a document's] creation. With rare exception, this is true of any particular documents we call federal records. The significance to the custodial agency and GSA is not that they didn't have to be created, but that they were created. Given the fact of their creation and existence, they may be disposed of only in accordance with applicable statute and regulation (44 U.S.C. 3314)." A 114a.

as evidence of agency activities that they simply are not "appropriate for preservation" under the statutory definition. Examples of such documents are ministerial materials like daily calenders or office directories which do not contain substantive information about agency activities. Other examples are uncirculated drafts or notes which represent the personal work product of the employee. Because these documents are not shared with other employees and do not directly document the transaction of agency business, they do not provide evidence of actual agency activities and operations and fall short of the statutory test for retention. It is undoubtedly this class of materials to which the House Report on the Disposal Act refers when it comments that 44 U.S.C. § 3301 "make[s] it clear that [agencies] are not obliged to consider every scrap of paper on which writing or printing appears as a record." H.R. Rep. No. 559, 78th Cong., 1st Sess 1 (1943).[37]

[37] In addition to relying on this statement, Mr. Kissinger and the Government point to a passage in the House Report which indicates that the Disposal Act was intended to "place the responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved . . ." H.R. Rep. No. 559, *supra*, at 1.

This statement, however, does not say that agencies will have the power to define which documents are "records." It merely says that they will have the initial responsibility for determining which documents will be preserved—a responsibility conferred by those provisions of the Records Act which contemplate that disposal recommendations for unneeded "records" will first be made by individual agencies and then forwarded to GSA for review. Indeed, the Report's recognition that preservation decisions will be made by the agency "in the first instance" implies that final authority for those decisions rests elsewhere, *i.e.*, with GSA. As discussed in the text, GSA could not exercise that power if individual agencies were free to exclude whole categories of documents from the definition of "records."

The dividing line between these "non-record materials" and "records", it should be stressed, is not a matter for agency discretion. The defining feature of "non-record materials" is that they are so devoid of value as evidence of government activities that the statutory scheme for records disposition can be bypassed without any risk of harming GSA's archival program. If a document has potential significance as a record of government business, the agency cannot declare it a "non-record" and permit an employee to destroy or remove it upon his retirement; rather, the agency must treat the document as a "record" and process it in accordance with the statutory requirements for records disposition.

Significantly, GSA agrees with this broad construction of 44 U.S.C. § 3301.[38] It has advised that "materials made or received either in pursuance of Federal law or in connection with the transaction of public business . . . [are] official record[s] subject to the provisions of Federal law pertinent to the maintenance and disposal of such records." A. 159a. Based on a careful review of federal records statutes, the National Study Commission on Records and Documents of Federal Officials shares this view.[39] It has concluded that, under

[38] As the expert agency charged by Congress with implementing the federal records statutes, GSA's contemporaneous construction of the definition of "records" is entitled to substantial weight. *Udall* v. *Tallman*, 380 U.S. 1, 16, *reh. denied*, 380 U.S. 989 (1965). Certainly, GSA's interpretation is more authoritative than that of the State Department's Legal Adviser, who has no special expertise or responsibility with respect to the Records Disposal and Federal Records Acts.

[39] Mr. Kissinger's Brief gives the impression that the Commission concluded that present law does not classify all documents relating to public business as "records." According to Mr. Kissinger, the Commission therefore urged that the statutory definition of "record" be broadened and that this broadened definition be implemented prospectively. Kiss. Br. 45. In fact, however, the Commission supported new legislation only in connection with White House, Congressional and judiciary records. National Commission, *Final Report*, 10-14 (1977). The Commission found that existing records statutes were sufficiently broad in scope to safeguard the official documents of other Executive Branch officials. *Id.* 96-97.

current law, "[a]ll documentary materials produced or received by appointed officials and concerning official agency business are Federal records, and are subject to all laws and regulations applying thereto."[40]

The contrary interpretation of 44 U.S.C. § 3301 proposed by the Government[41] and Mr. Kissinger would violate the rule that Congress normally intends to retain "long-established and familiar principles" in creating new statutory requirements. *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). As described above, it is a basic and widely-applied doctrine that documents produced in the course of public business are official documents which the government controls. One would expect Congress to employ unambiguous statutory language if it intended to depart from that principle and authorize individual agencies to reclassify particular documents relating to agency business as the private papers of agency officials. Yet there is no provision in the Federal Records Act which suggests an intent to overturn the common law rule that official documents are owned by the government. Nowhere does the Records Act mention a class of documents other than "records" or specify how such

[40] National Commission, *Final Report* 96-97 (1977).

[41] The Government has chosen to advocate an interpretation of 44 U.S.C. § 3301 which differs from GSA's. The Government's Brief appears to concede that it has departed from GSA's construction of the statute. Gov. Br. 23.

documents should be defined. And while the Act creates elaborate procedures for disposing of "records", it offers no guidance at all on the procedures and criteria for disposing of documents that relate to agency business but fall outside the "records" category.[42] It is hard to believe that Congress gave agencies discretion to create an indefinite and potentially sweeping class of "non-records", yet failed to identify those materials or provide standards for their use and disposition.

Moreover, if individual agencies were free to exclude large classes of documents from the "records" category, there would be two definitions of "records"—one under the FOIA and another under the records statutes. The FOIA was intended to require disclosure of "*all materials* of the government,"[43] and thus is based on a broad concept of "records" which includes virtually any document created in the course of transacting government business.[44] When the FOIA was adopted, however, Congress did not indicate that it was expanding the definition of "records" which it had included

[42] The absence of such guidance makes sense if "non-record materials" are limited to documents which have no possible evidentiary or archival value. It is understandable that Congress would have little interest in the procedures by which such documents are disposed of. It is much less believable, however, that Congress would be unconcerned about the procedures for discarding documents of genuine governmental importance.

[43] S. Rep. No. 1219, 88th Cong., 2d Sess. 15 (1964) (emphasis added).

[44] If "non-record materials" had the narrow definition which we propose above, it would not cause severe harm if they were excluded from the FOIA's coverage. On the other hand, a broader definition of "non-record materials," which includes a large number of documents that reflect government business, could cause immense damage to the FOIA's objectives if such a definition were used to limit the scope of FOIA disclosure.

in the Records Disposal Act fifteen years earlier. Indeed, the FOIA does not define the term "records" at all—evidence that Congress believed its earlier definition was sufficient and did not require modification.[45] It would be most anomalous if Congress expected federal agencies to follow radically different definitions of "records" under the FOIA and the records statutes, yet provided neither statutory language nor legislative history that expressed this intent.[46]

Most importantly, the basic records disposal scheme created by Congress could not function effectively if individual agencies had discretion to exclude broad classes of official documents from the statutory definition of "records." The premise underlying the statutory procedure for records disposition is that one agency, GSA, will have ultimate responsibility for determining which records have enough importance to be permanently retained. For example, according to the Senate Report, a major purpose of the Federal Records Act was the "creation of a central staff and service agency with responsibility for leadership in the field of records management." S. Rep. No. 2140, 81st Cong., 2d

[45] Not surprisingly, a number of agencies, including the State Department, have used 44 U.S.C. § 3301 to define "records" for purposes of the FOIA. *E.g.*, 22 C.F.R. § 6.1(b); *see also* 41 C.F.R. § 105-60.103(a). The Justice Department and at least one court have also adopted this approach. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, 23 (1967); *Nichols* v. *United States*, 325 F. Supp. 130, 134 (D. Kan. 1971), *aff'd* 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972).

[46] When identical terms are used in different statutes, they are usually accorded the same meaning, particularly when there is no evidence of a legislative intent to construe them differently. *Marks* v. *United States*, 161 U.S. 297 (1896); 2A *Sutherland on Statutory Construction* § 51.02 (4th ed. Sands 1973).

Sess., 1 (1950). Similarly, the House Report on the Records Disposal Act's predecessor statute stresses GSA's pivotal role in making archival determinations for all documents produced by the government:

> "The Archivist and his staff of trained and experienced examiners, with their combined knowledge of all Federal records, are eminently qualified to determine the value and interest of all records of the Government. The head of any agency of the Government should be able to determine the value and interest of records of that particular agency; however, he seldom has the necessary knowledge or facilities for determining whether the records of that agency are, or may become, of interest or value to another agency, or to other agencies, of the Government. The Archivist, on the other hand, being concerned with, and having a knowledge of, the records of all Government agencies, is in a position to determine whether records submitted for disposition by one agency are, or are likely to become, of value to another agency." H.R. Rep. No. 838, *supra,* at 3.

This government-wide authority over records disposition would be eroded if, under the guise of redefining the term "records", individual agencies allowed employees to remove documents relating to public business without any GSA review. In this event, valuable documents generated in the course of government activities could be excluded from the archival process simply because the agency had decided that they constitute "personal" papers rather than "records." No matter how important these documents might be, they would be exempt from the statutory procedure for records disposition, and thus could be removed from agency custody without agency records officers or NARS archivists ever determining whether their permanent

retention would benefit the government or general public."

For these reasons, the only construction of 44 U.S.C. § 3301 consistent with the effective operation of the federal records statutes is to define "records" to include *all* documents (1) created in connection with the transaction of official business and (2) providing evidence of the agency's policies, decisions, operations or activities. Once materials fit this description, it should then be the function of agency record officers and GSA archivists to review the documents for disposal or retention in accordance with the criteria for preservation in 44 U.S.C. § 3303.

This approach will not burden agencies with a mass of unwanted paperwork or prevent them from exercising selectivity in retaining the documents which their employees create. Large numbers of documents which government employees generate on a day-to-day basis will lack any evidential value and will be eligible for immediate destruction as "non-record materials." Moreover, once a document has "record" status, an agency has no obligation to retain it indefinitely. The document can be disposed of at any time, provided only that the statutory procedures for records disposi-

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[47] The undesirable consequences of bypassing the statutory procedure for records disposition have been underscored by the General Counsel of GSA:

> "[A] federal official may not conclusively establish a document as a personal paper, although its subject matter relates to official business, by merely designating it as personal, filing it separately, or withholding it from circulation. Were that the intent of Congress in enacting the Federal Records Act, the Freedom of Information Act, and related legislation, some of the most significant documents reflecting the conduct of public business would never be subject to public scrutiny." A. 112a.

tion are observed. Indeed, a variety of mechanisms are now utilized under the Records Disposal Act to provide for the routine destruction of large quantities of records without document-by-document review.[48] Accordingly, a broad construction of 44 U.S.C. § 3301 will implement Congress' intent by insuring consistency and uniformity in federal document disposal practices without creating any risk of administrative chaos.

b. The Presidential Records Act of 1978

Last year, Congress enacted the Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U:S.C. §§ 2202-2207). This statute overturns the longstanding custom of treating Presidential records as the personal property of the President and places such records on the same footing as the records produced by all Executive Branch officials. Significantly, the Act defines Presidential "records" in broad terms that encompass all documents which relate to official business and specifically provides that these records cannot be destroyed or disposed of without the written consent of the Archivist. Since the Act is explicitly patterned on the record maintenance and disposal statutes which apply to other Executive Branch officials, it provides important evidence of how Con-

[48] For example, under 44 U.S.C. § 3303(3), GSA may issue schedules which, for particular agencies, provide for the destruction of designated classes of documents after specified periods of time without further archival review. Under 44 U.S.C. § 3303a(d), which was added to the statute in 1976, GSA may now exercise this power with respect to records "common to several or all agencies." Pursuant to these provisions, numerous categories of State Department records are routinely disposed of at set intervals ranging from a few months to several years without additional GSA review. *See* Appendices A and B of the Department's *Records Management Handbook* (1977).

gress construes the definition of "records" in 44 U.S.C. § 3301.

At 44 U.S.C. § 2202, the Act provides that the "United States shall reserve and retain complete ownership, possession, and control of Presidential records." The term "Presidential records", in turn, is defined by 44 U.S.C. § 2201(2) as:

> "*documentary materials . . . created or received* by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, *in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.*" (Emphasis added.)

Coupled with this broad definition of "Presidential records" is a correspondingly narrow definition of "personal records" which the President and his aides may retain upon leaving office. 44 U.S.C. § 2201(3) provides that:

> "The term 'personal records' means *all documentary materials,* or any reasonably segregable portion thereof, *of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.* Such term includes—
>
> > '(A) *diaries, journals or other personal notes* serving as the functional equivalent of a diary or journal *which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;*

"(B) *materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President*; and

"(C) *materials relating exclusively to the President's own election to the office of the Presidency*; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, *which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.*" (Emphasis added.)

Taken together, these two provisions establish the broad principle that only materials which have no relation to or effect on the President's official duties can be considered his "personal papers."

The legislative history concerning the Act's definition of "Presidential" and "personal" records is revealing. According to the House Report, "Presidential records" are all documents "created by future Presidents and their staffs in the course of discharging their official duties", while "personal records" are "those materials which are neither developed in connection with nor utilized during the transaction of Government business." H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. 3 (1978). Moreover, the Report notes, "the volume of truly personal material is considered minuscule." *Id.* at 12.

Underlying the Act's dichotomy between personal and official materials is a concept of "records" which is applicable to all government officials. During hearings on the proposed legislation, "witnesses were in general harmony that that which is generated, created,

produced or kept by a public official in [the] administration and performance of the powers and duties of a public office belongs to the Government and may not be considered private property of the individual." *Id.* at 8. Moreover, the House Report reflects a clear belief that this principle already applied to other federal officials by reason of the Federal Records Act. According to the Report, the new statute

> "relies heavily on the definition of the term 'record' in 44 U.S.C. section [3]301 and the practice that has evolved in the administration of Chapter 29 of that title. To the extent that certain categories of documentary materials are not considered to be records under that chapter, the same categories of materials generated or received by the President and his aides would generally also fall outside the ambit of what constitutes a record." *Id.* at 10-11.

The Presidential Records Act does not empower the President and his aides to exclude some official materials from the definition of "records" and thereafter to remove those materials from government custody whenever they see fit. Instead, the Act emphasizes the Archivist's pivotal role in determining which Presidential materials will be preserved. Under 44 U.S.C. § 2203 (f)(1), when a President leaves office, the Archivist will "assume responsibility for the custody, control, and preservation" of *all* Presidential records. No records can be retained in the President's discretion, and under 44 U.S.C. § 2203(f)(3), the Archivist may dispose of particular records only if they are determined to have "insufficient administrative, historical, informational or evidentiary value to warrant their continued preservation."

The President's ability to dispose of unwanted records is no greater during his term of office. Under 44 U.S.C. § 2203(c), the President may remove or destroy records that "no longer have administrative, historical, informational, or evidentiary value" only if he has obtained the written views of the Archivist and he does not object to the proposed disposition. In the event that the Archivist has such an objection, the President must submit a records disposal schedule to the Congress, which then has sixty days to take action.

The House Report emphasizes the parallel between these procedures and existing statutory mechanisms for disposing of federal records. As it states, the House Committee "felt [it] important that once having declared the President's papers to be Government records, they be governed to the extent feasible by the same statutory standards controlling Cabinet members' records and all other Government records." H.R. Rep. No. 95-1487, *supra,* at 8. Moreover, the Report also points out that the "records schedules to be filed with the Congress are to follow the model of schedules currently filed with the Archivist by Federal agencies pursuant to Title 44", and that the requirement of archival review is "based on the maxim that 'those closest to the making of history are often the least able to judge the significance of their actions.' " *Id.* at 13.

In sum, the Presidential Records Act of 1978 defines "records" as all documents relating to official business and forbids their removal from government custody without prior review by the Archivist. When Congress enacted these requirements for the preservation of Presidential records, it did not enact similar requirements for the records of other federal officials because it clearly assumed that they were already

embodied in existing federal records statutes. Thus, the Presidential Records Act confirms that 44 U.S.C. § 3301 reaches *all* documents that are created in the course of public business and provide evidence of agency functions and activities.

c. GSA Regulations

If it is possible to exempt documents relating to official business from the definition of "records" in 44 U.S.C. § 3301, the power to grant such exemptions resides solely with GSA, not individual agencies. As amended, 44 U.S.C. § 2904 expressly authorizes the Administrator of GSA to "promulgate standards, procedures, and guidelines with respect to records management." [49] And under 44 U.S.C. § 2905, the Administrator is required to "establish standards for the selective retention of records of continuing value." [50]

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[49] Prior to the Federal Records Management Amendments of 1976, Pub. L. No. 94-575, 90 Stat. 2723, 44 U.S.C. § 2910 provided that GSA would have "final authority in matters . . . involving disposal practices in Federal agencies." The replacement of this provision with a broad authorization for GSA to promulgate standards relating to records-management (44 U.S.C. § 2904) does not signify any weakening of its power. As the Senate Report on the 1976 Amendments explains, the new provision "expands and further clarifies the role of the Administrator with respect to . . . records disposition." S. Rep. No. 94-1326, 94th Cong., 2d Sess. 5 (1976).

[50] The legislative history of this provision demonstrates that it was intended to authorize GSA to designate classes of documents which all agencies would be required to preserve:

> "This subsection requires the Administrator to establish standards for the guidance of federal agencies in determining the classes and types of records that should be retained and those that should be disposed of; and to assist agencies in the application of such standards." H. Rep. No. 2747, 81st Cong., 2d Sess. 13 (1950).

Based on these and other statutory provisions, the General Counsel of GSA has advised that "every agency head shall operate the agency's records management program in full cooperation with and under regulations prescribed by GSA." A. 105a. Indeed, the State Department's own records management regulations recognize that the guidelines promulgated by GSA "apply to all federal agencies" and "establish the basic procedures and standards applicable to records and paperwork management." 5 FAM § 411.4. As the legislative history of the Federal Records Act states, "[t]he heads of the federal agencies . . . would be *required* to observe standards and principles laid down by the Administrator of General Services, within his authority." 96 Cong. Rec. 11096 (1950) (emphasis added).[51]

GSA regulations provide that documents can be removed by retiring employees only when they are "[p]apers . . . of a private or non-official character which pertain only to an individual's personal affairs", 41 C.F.R. § 101-11.202-2(d). Moreover, GSA requires all portions of personal papers "that pertain to official business" to be extracted and included in agency files. *Id.* Recently, GSA has emphasized that the "definition

[51] GSA's power to prescribe uniform record-retention standards for all federal agencies is evident in other provisions of the Federal Records Act. 44 U.S.C. § 3105 requires each federal agency to establish safeguards against the removal or loss of records. Significantly, these safeguards must include all procedures "required by regulations of the Administrator of General Services." Similarly, 44 U.S.C. § 3102 requires each federal agency to establish an "active, continuing program for the economical and efficient management of the records of the agency." This program, too, must be in compliance with all regulations that the Administrator has issued. 44 U.S.C. § 3102(3).

of personal papers covers materials pertaining solely to an individual's private affairs." Accordingly, GSA has advised, "correspondence designated 'personal', 'confidential', or 'private', etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of federal law pertinent to the maintenance and disposal of such records." According to GSA, "official records are public records and belong to the office rather than the officer." GSA Bulletin FPMR-B-65. A. 159a.

GSA regulations distinguishing between "records" and "personal papers" are no different from the regulations of the Department of State. But were there any conflict, the Department's regulations would necessarily have to yield to GSA requirements, which are binding throughout the federal government and will override contrary regulations that individual agencies may adopt. GSA's government-wide definition of official records includes *all* documents that are prepared in the course of official business and provide evidence of agency activities and transactions. Under this definition, the transcripts of Mr. Kissinger's telephone conversations plainly constitute "records" of the Department of State.

d. Practices of Other Agencies

Universally, the various federal agencies have observed the principle that documents which are created in the course of transacting government business and provide evidence of agency activities are official "records" and can only be disposed of in accordance with the procedures for records disposition established by Congress. While these agencies have recognized a narrow class of "non-record materials", they have limited

these materials to documents which have no possible value as evidence of agency functions and operations.

The Department of Defense directs its senior officials that "the removal of classified documents or those pertaining to public business is prohibited by law." A. 217a. Under Department procedures, the only documents that retiring employees may retain are "diaries, logs, memoranda of personal telephone calls, etc., which do not contain reference to official business." *Id.* Whenever Defense Department officials receive or create documents of a mixed character, the Department directs that *all* official material should be excerpted from the personal correspondence and made a part of the official file." *Id.* (Emphasis added.) The Department considers it particularly important to avoid removing ostensibly personal papers that contain "classified or privileged information." A. 219a.

The Department of the Navy has advised presidential appointees that, under 44 U.S.C. § 3301, official records are any documentary materials "made or received . . . in connection with the transaction of public business." A. 224a. According to the Department, "some evidence or information concerning these matters is contained in practically all documents received or created [and] hence, these documents should not be removed . . . ." Department policy also forbids the removal of documents containing classified information. *Id.* The Department permits "papers that are purely personal" to be retained by retiring officers. However, to qualify as personal, these materials must be "papers, such as correspondence and notes, received and originated or signed by the official essentially as a private citizen, in contrast to those he receives or signs as an agency official." A. 226a. The Department also accords

personal treatment to "diaries, provided the diary is not in fact a collection of government documents and information." *Id.*

The Department of the Interior has determined that "[r]ecords made in connection with the transaction of public business or pursuant to law belong to the Government, not to any individual officer or employee." A. 236a. Such documents are to be identified by the "statutory definition of 'records' " and "may be disposed of only in accordance with the statute and applicable records control schedules." *Id.* Like other agencies, the Department has recognized that "papers which are clearly personal may be removed." *Id.* Falling into this category are such items as office diaries, notes and logs. However, the Department has stressed that "even the work papers of government officials are records subject to the Act." A. 237a. Thus, "in the case of papers containing both personal and official matter, extracts are to be prepared of the official portions." A. 236a. Moreover, the Department forbids the "physical retention of classified national security information by any individual upon retirement or other termination from the Department." A. 238a. The Department has indicated that it will review the "personal" papers of a departing official to assure that they do not contain official information that should be preserved in Department files. A. 237a.

The Department of the Treasury has adopted an approach "which regards any record created or received in the course of official duties as official." [52] Depart-

[52] Memorandum of the Department of the Treasury to the National Study Commission on Records and Documents of Federal Officials 3 (1976).

ment policy provides that national security information "may not be removed under any circumstances" and the Department reviews the papers of outgoing officials to insure that this policy is enforced.[53] The same principles were observed by the Ford Administration in disposing of White House records after President Ford left office. According to a memorandum of Presidential Assistant Phillip Buchen, departing White House aides were only allowed to retain "purely personal files and materials" and were specifically instructed that "[p]ersonal files *do not* include any copies, drafts or working papers that relate to official business or the campaign." (Emphasis in original). A. 164a.

These agencies have classified two types of documents as "non-record materials" that may be destroyed or removed without archival review: (1) documents which are wholly ministerial and do not contain substantive information about agency activities, and (2) documents which represent the personal work product of agency employees and thus do not reflect the actual transaction of agency business. GSA regulations, for instance, cite "preliminary worksheets" as an example of "non-record materials" [54] and, in 1972, GSA advised that such materials could include "working drafts and notes", "notebooks", "appointment calendars" and office "directories." A. 262a. Similarly, the Department of Defense has determined that "non-record materials" include "materials that have no documentary or evidential value", including "working papers" and "preliminary or intermediate drafts" which have "no informational value once action has been completed

[53] *Id.* at 1.

[54] 41 C.F.R. § 101-11.401.3(d).

since they do not relate to significant steps taken in preparing record copies of documents." A. 222a.[55]

To the same effect are Office of Management and Budget guidelines under the Privacy Act which provide that "records" do not include notes and papers that are "uncirculated" and "over which the agency exercises no control or dominion (*e.g.*, personal telephone lists)." 40 Fed. Reg. 28948, 28952 (July 9, 1975). This approach is embodied in *Porter County Chapter of the Izaak Walton League* v. *AEC*, 380 F. Supp. 630, 633 (N.D. Ind. 1974), which holds that uncirculated, handwritten documents which represent solely the thought processes of government employees are not "records" under the FOIA.

The differences between "non-record materials" and the transcripts of official conversations at issue here are

[55] A number of state public records statutes define "non-record materials" in similar terms. The 1971 New York law, for example, exempts "[l]ibrary or museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience or reference, and stocks of publications and of processed documents." N.Y. [Educ.] § 142(c) (McKinney 1978). The Minnesota statute adds to the nonrecord category "data and information that does not become part of an official transaction." Minn. Stat. Ann. § 138.17 (West 1979). Under the Maryland Act, "acceptances or refusals of invitations or engagements and other personal business of public officials" are nonrecord materials. Md. Code Ann. art. 54 § 9 (1976). The Oregon statutes covering public records, among the most detailed in the country, provide for the disposition of the following material without "specific authorization": (1) inquiries and requests from the public; (2) public records which are duplicates "by reason of their having been photocopied"; and (3) "letters of transmittal and acknowledgment, advertising, announcements and correspondence or notes pertaining to reservations of accommodations or scheduling of personal visits or appearances." Or. Rev. Stat. 3192.170 (1977).

dramatic. The transcripts are not handwritten materials prepared by an official solely for his own use and reflecting his private thought processes. Nor are they ministerial documents (like office directories) containing no substantive information about agency activities. Rather, they are typed documents, prepared by government secretaries using government monitoring equipment, that record actual conversations between Mr. Kissinger and other high officials concerning affairs of state. Moreover, the transcripts were used by Mr. Kissinger and his aides to facilitate the transaction of State Department business. Thus, the transcripts both document actual Department activities and operations and were used as evidence of those activities and operations by Department employees at the time they were made. Given these factors, the lower courts properly concluded that the transcripts were official "records" under 44 U.S.C. § 3301 and that they were removed from the Department in violation of the Records Disposal Act's procedures for records disposition.

2. State Department Regulations Classify the Transcripts as Official "Records"

Mr. Kissinger insists that, under State Department regulations, documents created in the course of a Department employee's official duties will be treated as private papers merely because the employee filed them as "personal" when they were prepared. If Mr. Kissinger is correct, an employee's unilateral determination that documents are "personal" would be sufficient to justify their removal from the Department, and no further review of their status by Department or NARS record officers would be permitted. This extraordinary

theory is contradicted by the very State Department regulations on which Mr. Kissinger relies. In accordance with 44 U.S.C. § 3301 and GSA requirements, these regulations provide that *all* documents which relate to official business and provide evidence of agency activities are Department records and must remain in its files until the statutory procedures for records disposition have been observed.

a. The Department's Definition of Personal Papers

5 FAM § 432 provides as follows:

> "*Papers of a personal character which pertain only to an individual's private affairs* and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records of the office at all times." (Emphasis added).

Under this provision, Department employees may only designate documents "personal" if they are "papers of a personal character which pertain only to an individual's private affairs." When documents relate to the business of the Department, personal designation is improper. 5 FAM § 417.1(a)[56] prohibits retiring Department employees from removing papers which are kept in their offices without the approval of the Director of the Department's Document Center. The only ex-

[56] This provision in its entirety requires as follows:

> "No papers kept in an employee's office that have not been explicitly designated or filed as personal at the time of origin or receipt may be removed from the Department or a post when the employee resigns, transfers to another Federal agency, or is otherwise separated from the Department or the Foreign Service, or at any other time, without the approval of the Director, Foreign Affairs Document and Reference Center."

ception to this rule is for documents "explicitly filed as personal at the time of origin or receipt." However, since "personal" designation is reserved for papers which pertain solely to the employee's private affairs, this exception does not apply to documents produced in connection with the employee's official duties. As the Department has advised, such documents are Department "records" and must remain in its files unless the Director of its Document Center has expressly authorized their removal. A. 203a.

The Department's *Records Management Handbook* (1977) confirms that personal files cannot include documents which relate to official business. ¶ 188 of the *Handbook* defines "personal files" as "[f]iles maintained by an officer pertaining only to his personal affairs." As the *Handbook* advises, "[o]ffice working files, preserved by an officer to document his assigned responsibilities in the Department or at a post, are not considered personal files." *Id.* Moreover, personal files cannot be intermingled with job-related materials. ¶ 273 of the *Handbook* emphasizes that "[p]apers of a purely personal nature pertaining to an employee's private affairs must be maintained separately from the working files relating to his assigned responsibility . . . ." [57]

[57] A recent study of the State Department's records system, prepared for the National Commission on Records and Documents of Federal Officials, reports that the Department's Historical Office considers "personal papers" to include "texts of speeches, calendars, appointment books, newspaper clippings, invitations, menus, etc." According to the author, "[e]ssentially everything else is official", including diaries, which the office regards as "records of official acts." A. Nelson, *Foreign Policy Records and Papers*, a paper prepared for the National Study Commission on Records and Documents of Federal Officials 55-56 (1976).

Other Department regulations confirm that documents relating to Department business are subject to official control and must remain in Department files when individual employees retire. For example, 5 FAM § 417.1(c) provides that:

> "Unclassified documents *relating to the performance of an employee's official duties* may be copied and privately retained by an employee if approved by the Director, Foreign Affairs Document and Reference Center." (Emphasis added).

If original documents "relating to the performance of an employee's official duties" could be removed merely by designating them "personal", then this provision—which requires official authorization before *copies* of such records can be removed—would be meaningless.

Similarly, under 5 FAM § 432, even when documents have been properly designated and filed as personal, retiring employees must extract and leave in Department files *all* materials that pertain to official business:

> "When official policy matters are discussed in personal correspondence, *that portion pertaining to functions or activities of the Department* or a post is to be extracted and made a part of the official records." (Emphasis added).

This extracting requirement does not permit retiring employees to select which portion of a "personal" document the Department will retain. *All* parts of the document which concern Department affairs must be incorporated in its "official records." This insistence on full extracting of official matter reflects the Department's policy of "maintain[ing] exclusive control over all records of Department business." As the Department has explained, "until such official material is ex-

tracted for the Department's records, the Department has a predominant interest in the paper that is otherwise personal." A. 204a.

To enforce these policies, 5 FAM § 417.2 provides that all departing Department officials must sign a separation statement designated "JF-3." JF-3 requires each retiring employee to attest that he has "surrendered to responsible officials all unclassified documents and papers relating to the *official business of the Government* acquired by [him] while in the employ of the Department. . . ." (Emphasis added). A. 255a. This pointed injunction against removing *any* official information directly contradicts Mr. Kissinger's claim that Department employees may retain any document concerning official matters that they have designated "personal." [58]

In addition to establishing the Department's control over all official documents which its employees produce voluntarily, Department regulations provide that certain classes of documents *must* be created and included in official files. Among these documents are full records of every telephone conversation "of any significance":

> "Decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record. The information should be written in the form of aides-memoire, memorandums of conversation, or memorandums to the file." 5 FAM § 423.2-1.

[58] Mr. Kissinger in fact signed a Form JF-3 before leaving Department service. A. 255a.

This regulation does not, it is true, specify any particular format for documenting official telephone conversations. However, Mr. Kissinger has never demonstrated that, apart from maintaining transcripts, he made *any* systematic effort to document his telephone conversations—much less documented all conversations of "any significance" as 5 FAM § 423.2-1 requires.[59] Moreover, Mr. Kissinger has acknowledged that he and his aides used the transcripts to insure adequate follow-up actions on his telephone discussions; this would appear to be the precise purpose for which the Department requires that a record of those discussions be kept.

Thus, the transcripts represented Mr. Kissinger's mechanism for complying with the documentation requirement of 5 FAM § 423.2-1. That the transcripts were prepared to satisfy Department regulations demonstrates that the Department affirmatively classified them as its "records". This classification is the clearest possible evidence that the transcripts were not "personal papers" which the Department permitted Mr. Kissinger to remove from its files.

[59] Mr. Kissinger does suggest that there are other documents which reflect the substance of certain telephone conversations. For example, he points out that the RCFP and MAP FOIA requests sought all written records of Mr. Kissinger's conversations—telephonic and otherwise—and that these requests were denied on the ground that such records constitute "a very large and undifferentiated volume of material." A. 56a, 57a, 71a, 79a. *See* Kiss. Br. 5. It goes without saying that, during his five years as Secretary of State, a large volume of materials was prepared that reflect some of the many person-to-person meetings, formal negotiations, conferences and telephone conversations in which Mr. Kissinger participated. The existence of these materials, however, hardly establishes that memoranda were prepared of *every* telephone conversation of *any* significance, as 5 FAM § 423.2-1 required.

b. The Protection of Classified Information

Mr. Kissinger's claim that the transcripts were "personal papers" clashes with another important Department policy: the Department insists on retaining all documents which contain classified information.

When Mr. Kissinger was Secretary of State, the classification of national security information throughout the federal government was controlled by Executive Order 11652, issued on March 8, 1972. 3 C.F.R. 678 (1971-1975 Compilation).[60] Section 6 of this Executive Order establishes policies for limiting the dissemination of classified information. One of these policies is that "[c]lassified information and material shall be used, possessed, and stored only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons." 3 C.F.R. 686. Another policy is that "[c]lassified information and material no longer needed in current working files or for reference or record purposes shall be destroyed or disposed of in accordance with the records disposal provisions contained in Chapter 33 of Title 44 of the United States Code." *Id.*[61]

In interpreting its responsibilities under this Executive Order, the Department has forbidden retiring em-

[60] On June 28, 1978, President Carter issued Executive Order 12065, 43 Fed. Reg. 28949 (July 3, 1978), which prescribes new standards and procedures for the classification of national security information.

[61] These policies were implemented by a National Security Council Directive issued on May 17, 1972. 3 C.F.R. 1085 (1971-1975 Compilation) This Directive prescribes stringent physical requirements for facilities where classified information is stored and imposes strict limitations on the persons to whom such information can be disclosed.

ployees to retain *any* document which contains classified information. As the Department has explained:

> "[I]rrespective of whether official matters have been extracted from a paper containing personal material, the Department has a predominant interest in the storage of a paper containing classified information. The Department has final authority over how and where *all* papers held by Department employees and containing classified information are kept." A. 204a (emphasis in original).

This Department policy is rooted in a 1959 Cabinet Paper issued during the Eisenhower Administration. Construing the predecessor of Executive Order 11652, this Paper concluded that classified information "should not be removed from the custody, control, or possession of any Department, agency, or person charged with its protection, and title to such material may not be transferred from the United States."[62] In

[62] Removal of Records by Retiring Department and Agency Heads, White House Cabinet Paper, July 27, 1959, at 3.

At the same time, the Cabinet Paper advised that extra copies of documents which contain classified information may be removed from government custody if procedures are instituted to protect their confidentiality and title to the copies remains in the United States until the information has been declassified. *Id.* at 5.

It was in accordance with this basic approach that Mr. Kissinger transferred copies of certain Department records in his working files to the Library of Congress pursuant to the First Agreement. Under that Agreement, copies of government papers cannot be moved to the Library until they have been reviewed by Department officials to assure that original or record copies are retained in Department files. A. 43a. In addition, no government papers can be made available to the public until the Department has determined that they lack classified information, and no person may have access to classified papers unless he has an appropriate security clearance. A. 43a-44a. As a final precaution, Department security officials were required to inspect the storage

accordance with this requirement, the Department's Separation Statement requires each retiring employee to affirm that:

> "I have surrendered to responsible officials all classified or administratively controlled documents and material with which I was charged or which I had in my possession, and *I am not retaining* in my possession, custody, or control, documents or material containing classified or administratively controlled information furnished to me during the course of such employment or developed as a consequence thereof, including *any diaries, memorandums of conversations, or other documents of a personal nature that contain classified or administratively controlled information.*" A. 255a (emphasis added).

Thus, the Department's position is that *no* document (business or personal) which contains classified information can be removed from its files.

The Department attempts to maintain control over classified information by a "senior official rule" which was adopted in 1960 and is embodied in 5 FAM § 946. Under this rule, former presidential appointees may be authorized access to classified information concerning their Department duties which is located in Department

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facilities at the Library where copies of Department records were to be kept and determine that these facilities were appropriate for maintaining classified documents. A. 253a.

Significantly, these precautions are inapplicable to the transcripts of Mr. Kissinger's conversations. Since these transcripts are classified as "personal papers" under the First and Second Agreements, Mr. Kissinger is not prevented from disclosing their contents to the general public, even if they contain classified information, or from showing them to persons who lack appropriate security clearances.

files.[63] The objective of this procedure is to persuade senior officials to leave documents containing classified information in the Department's control. As the Department has stressed, 5 FAM § 946 is "[o]ne of the major inducements [it] uses to insure that records are not removed." A. 204a. Prior to Mr. Kissinger's tenure as Secretary, the "senior official rule" in fact accomplished this objective. Mr. Kissinger's two predecessors, Dean Rusk and William Rogers, as well as virtually all of their top aides, left their working files in Department custody.[64]

In his eight years of government service, Mr. Kissinger unquestionably discussed classified information during his telephone conversations and such information is necessarily reflected in the transcripts.[65] Under established State Department policies and practices, transcripts containing classified information consti-

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[63] The rule also provides that, at the request of former officials, information will be reviewed for declassification. This procedure attempts to make it easier for these officials to write memoirs or otherwise explain their public actions while insuring that the Department can prevent the unauthorized disclosure of confidential information.

[64] A. Nelson, *Foreign Policy Records and Papers, supra,* at 56. *See also* A. 205a.

[65] The portions of the transcripts which Mr. Safire's FOIA request encompassed were reviewed for classified information by the Department's Council on Classification Policy, which determined that the conversations in question did not contain any classified information. A. 81a. However, so far as the record discloses, the remainder of the transcripts (a much larger body of materials) was never reviewed for classified information. As Secretary of State, Mr. Kissinger had frequent occasion to obtain and discuss sensitive diplomatic, intelligence and military information. It therefore stands to reason that Mr. Kissinger discussed classified information during *some* of his telephone conversations in government service.

tuted Department "records" and should have remained in Department files. In this respect as well, State Department requirements contradict Mr. Kissinger's claim that the transcripts were "personal papers" and demonstrate that their removal from Department custody was unlawful.[66]

c. The Extracts

After the transcripts were removed from Department custody, extracts were prepared by Lawrence Eagleburger, a close aide of Mr. Kissinger, for inclusion in the Department's files.[67] Mr. Kissinger insists that these extracts—and not the original transcripts from which they derive—represent the only "records" which the Department should have retained and that

[66] If this Court agrees that the FOIA applies to the transcripts, it is possible that the Department will later seek to withhold portions of the transcripts on the basis of FOIA exemption 1, which applies to classified national security information. We believe that there is a substantial question whether the Department can properly rely on exemption 1 after failing to take any action to prevent Mr. Kissinger from removing classified information contained in the transcripts from Department custody. This issue will need to be considered by the court below on remand. At the present stage, the significance of the Department's policies concerning classified information is principally to demonstrate that removal of the transcripts violated Department regulations.

[67] It is unclear when the extracts were deposited with the Department. The record indicates, however, that, as of January 18, 1977, preparation of the extracts was still in progress A. 90a, 94a. The Government maintains that the Department was obligated to retain the original transcripts at least until adequate extracts were prepared and included in Department files. Gov. Br. 51. While we disagree that the transcripts could be relinquished at this point, it should be noted that, under the Government's reasoning, the original transcripts should have been in the Department's files on December 28, 1976, when the MAP FOIA request was filed, and on January 13, 1977, when the RCFP request was filed.

preservation of the original transcripts was unnecessary.[68] This argument is without merit for two separate reasons.

First, under 5 FAM § 432, extracting is only permissible for "papers of a personal character", not for documents prepared in connection with the transaction of official business. The Department's Separation Statement requires Department officials to surrender all "documents and papers relating to the official business of the Government." A. 255a. Indeed, if papers contain classified information, they cannot be retained even if they are personal in character. *Id.* Moreover, while 5 FAM § 417.1c permits retiring employees to obtain official approval to remove *copies* of unclassified documents relating to their duties, the Department's regulations nowhere authorize employees to remove the *originals* of such documents. Accordingly, if "extracts" were to be prepared, it was so Mr. Kissinger could retain purely personal portions of the tran-

[68] The Government has expressed qualified agreement with this argument. While noting that the Archivist takes the position that the original transcripts in their entirety should have remained in Department files, it maintains that Mr. Kissinger could have removed those transcripts "so long as extracts were made of [their] business portion . . . for the permanent files." Gov. Br. 23, 47-49. Further proceedings are necessary, the Government argues, "to judge the extent to which the extracts adequately documented the agency business in the [transcripts]." *Id.* at 23.

As discussed in the text, we disagree that the preparation of extracts could have justified removal of the original transcripts under any circumstances. Wholly apart from this objection, moreover, we disagree that further proceedings are necessary to assess the adequacy of the extracts. As expiained in the text, the present record demonstrates that the extracts do not include the "business portions" of Mr. Kissinger's conversations in their entirety and, thus, the extracts do not satisfy the standard that the Government itself would apply.

scripts for his own files. The original transcripts were required to remain in Department custody.

Second, 5 FAM § 432 provides that, even where extracting is appropriate, it must encompass all portions of the document "pertaining to the functions or activities of the Department."[69] Similarly, under 5 FAM 423.2-1, the Department's official files must contain memoranda of all conversations "of any significance." According to the Department's Legal Adviser, however, Mr. Eagleburger was instructed to extract only those portions of the transcripts which "contain any significant policy decisions or actions not otherwise reflected in the Department's records." A. 259a. Because there is a broad spectrum of conversations that this standard would not encompass, the extracts clearly comprise but a small fraction of the official conversations in which Mr. Kissinger participated during his eight years in government.

Under the Legal Adviser's standard, the extracts would not include Mr. Kissinger's conversations with foreign and domestic officials in which no "policy decisions" were made or no official "actions" were taken. This category of conversations could involve the transmittal of important diplomatic information, the exploration of policy alternatives or the initial steps in a complex diplomatic negotiation. Moreover, even if a conversation contained a "policy decision" or "action",

[69] Thus, the Donation Procedures Memorandum, which prescribes procedures for transferring Mr. Kissinger's working files to the Library of Congress, provides that, when they encounter "any document containing both personal and official matter," Department record officers must assure that "an extract of official contents will be prepared for inclusion in the Department's record system." A. 252a.

it still would not be reflected in an extract if Mr. Eagleburger determined that it was not "significant." Depending on Mr. Eagleburger's interpretation of this term, numerous conversations recording Department decisions and actions might not have been extracted on the ground that they were simply too unimportant. Finally, even if a conversation recorded a policy decision or action that was significant, an extract still might not have been prepared if it was determined—again in Mr. Eagleburger's subjective judgment—that the decision or action was "otherwise reflected in the Department's records." Under this criterion, Mr. Eagleburger would have been free not to extract conversations in which major foreign policy decisions were made on the ground that the substance of those decisions was reflected in other Department documents.

Because of these omissions, the highly edited extracts prepared by Mr. Eagleburger represent a small and selective sampling of the official telephone discussions in which Mr. Kissinger participated as Secretary of State. Even if it is assumed that extracting was permissible to start with, Department regulations required those extracts to contain all non-personal portions of Mr. Kissinger's telephone conversations. Since Mr. Eagleburger observed a far less inclusive standard in preparing the extracts, they cannot substitute for the complete transcripts and provide no basis for removing those transcripts from Department custody.

d. The Department's Definition of "Non-Record Materials"

The only documents which the Department defines as "non-record materials" are listed in ¶ 272 of the Department's *Records Management Handbook.* These documents include "information or extra copies" of

communications; Department and other federal publications; newspaper clippings; rough drafts and working papers; other background data; and office chronological and reading files.

The transcripts fall into none of these categories. They plainly cannot be considered "rough drafts" and "working papers" since they involve not Mr. Kissinger's personal work product but records of his business communications with other United States and foreign officials which were circulated to his aides after they were prepared. Moreover, under Department regulations, even "rough drafts" and "preliminary notes" must be considered records when they "form an integral part of the finished document or show changes in policy." 5 FAM § 423.2-8. Thus, in accordance with 44 U.S.C. § 3301, the Department recognizes that materials which have some value as evidence of Department activities must be retained as "records" even if they are "rough" and "preliminary." Under this approach, the transcripts would have the status of "records" if for no other reason than because they shed great light on the genesis and evolution of Department policies and decisions.

Finally, even if the transcripts could be considered "non-record materials" and not "records", the procedures for their removal would still be unlawful in two separate respects and the transcripts would remain Department property.

First, as discussed above, Executive Order 11652 (which was in effect in 1976) provides that documents containing classified information can only be removed in accordance with the procedures established by the Records Disposal Act, and the State Department prohibits retiring employees from removing documents

containing classified information under *any* circumstances. Thus, even if the transcripts are not "records" under 44 U.S.C. § 3301, portions of the transcripts containing classified information were required to remain in Department files until the Department had complied with statutory procedures for records disposition.

Second, under 5 FAM § 417.1(a), unless a document relates solely to an employee's private affairs and was designated and filed as "personal" at the time of origin or receipt, it cannot be removed from Department custody by a retiring employee without the approval of the Director of the Department's Document Center. The transcripts were never reviewed by the Center's Director because Mr. Kissinger took the position that they were personal papers which he was free to remove without any Department authorization. Without the approval required by 5 FAM § 417.1(a), removal of the transcripts violated Department regulations even if the transcripts *could* be considered "non-record materials."

e. The "Deference" Owed to the State Department's Determinations

Even though no Department regulation classifies the transcripts as personal papers, Mr. Kissinger strenuously asserts that the Department "determined" that they had this status and urges that this "determination" should be accorded deference by the courts. Kiss. Br. 39-41. In fact the "determination" on which Mr. Kissinger relies was made not by the Department but by its Legal Adviser, and occurred under highly irregular circumstances which severely limit the weight it should receive. The transcripts had already been removed from Department custody when the Legal Adviser concluded that they were personal papers, the

basis for this conclusion was never articulated intelligibly, and the Department has never defended the Legal Adviser's construction of its regulations in the courts.

The transcripts were removed from the State Department on October 29, 1976. Prior to that removal, transcripts from Mr. Kissinger's State Department period were never reviewed by the Director of its Document Center or the Legal Adviser, and there was no formal determination that they were Mr. Kissinger's personal papers.[70] The Legal Adviser first issued a written opinion that the transcripts had this status on November 11, 1976, two weeks after they had been delivered to the Rockefeller estate. This opinion, however, contains virtually no analysis of pertinent Department regulations. And while the Legal Adviser's conclusions are reiterated in his denials of the MAP and RCFP FOIA requests on January 18 and 28, 1977, these denials do not cite or discuss specific Department regulations. A. 61a, 73a. Thus, the Legal Adviser's opinions cannot be considered an impartial and carefully reasoned inter-

[70] Portions of the transcripts from Mr. Kissinger's White House period were reviewed in connection with the Safire FOIA request. However, this request was denied on the ground that the transcripts in question were exempt from FOIA disclosure as the work product of a presidential assistant. A. 172a-173a. Whether the transcripts of Mr. Kissinger's conversations as Secretary of State were Department records was an issue that the Safire FOIA request did not raise. While the Legal Adviser's Memorandum of November 11, 1976 refers to previous oral advice provided in connection with that request, there is reason to believe that this advice did not involve the State Department transcripts but was limited to the transcripts of White House conversations sought by Mr. Safire. Significantly, the Justice Department has indicated that it was consulted about the Safire request solely to ascertain whether documents created by Mr. Kissinger while he was Assistant to the President were subject to the FOIA. A. 115a.

pretation of Department policies. Instead, they are best regarded as a *post hoc* rationalization for a course of action on which the Department's head, for his own reasons, had already embarked.

If formal Department policies and practices established that the transcripts were Mr. Kissinger's personal papers, one would expect the Department to defend that position in the courts. However, in the two lower courts, the Department *never* suggested that Mr. Kissinger's construction of its regulations was correct. Indeed, in this Court, the Government has explicitly disputed the Legal Adviser's analysis, arguing that "[t]he notes pertaining to agency business . . . belonged to the agency throughout Kissinger's tenure as Secretary of State."[71]

Finally, while a "reasonable" interpretation of agency regulations may be entitled to deference, no agency has any authority to violate its regulations. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). This rule applies with special force when agency record-keeping determinations receive judicial scrutiny in suits under the FOIA. Paragraph (a)(4)(B) of the

[71] Gov. Br. 23. The only point on which the Government has suggested the Legal Adviser is entitled to deference is his conclusion that the original transcripts could be removed from Department custody if adequate extracts were included in Department files. *Id.* 47-48. However, the Government contends that this extracting process should encompass all "official matters reflected in the notes" (*id.* 47) and "the business portions of the notes" (*id.* 23)—notably more complete standards for extracting than recommended by the Legal Adviser. Moreover, notwithstanding the Legal Adviser's conclusions, the Government has emphasized that the "record does not contain any indication whether the State Department believes the extracts are sufficient for purposes of its records management program." *Id.* 49.

Act provides that, when agency records are withheld, the courts shall "determine the matter *de novo*." Thus, an agency's conclusion that documents produced by its employees are not "records" to which the FOIA applies cannot be accepted on faith. Rather, it must receive searching examination by the courts and should be accorded deference only if supported by the clear weight of reason and experience. In this case, the Legal Adviser's conclusion that the transcripts were private papers is directly contrary to the Department's own regulations governing the creation and maintenance of official records and both can and should be disregarded.

II.

THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE POWERS TO COMPEL THE RETURN OF THE TRANSCRIPTS TO THE DEPARTMENT OF STATE

The procedures prescribed by the Records Disposal Act for disposing of agency records are "exclusive." 44 U.S.C. § 3314. When those procedures have been ignored, movement of a document to a location outside agency custody cannot change its status; the document remains a "record" of the agency within the meaning of 44 U.S.C. § 3301. Since the transcripts were removed from the Department of State without adherence to the Records Disposal Act, they therefore remain Department "records". Their present location at the Library of Congress is irrelevant.

It is clear that, as Department "records", the transcripts would be subject to the FOIA if requesters had sought their disclosure while they were still in Depart-

ment custody.[72] Unknown to requesters and without any public announcement, however, the transcripts were moved to private property a matter of weeks before the FOIA requests were made. The question arises, accordingly, whether documents that leave the custody of an agency are beyond the reach of the FOIA—even though removal of the documents was unlawful, the documents remain agency "records" in every respect except physical location, and the FOIA requesters had no reason to believe that the documents had been removed when they sought disclosure.

Mr. Kissinger and the Government argue that the FOIA ceases to apply the moment a record leaves agency custody. Kiss. Br. 13-30; Gov. Br. 27-38. We disagree. This reading of the FOIA is justified by neither its statutory language nor its legislative history. If adopted, it would create a dangerous mechanism for circumventing the broad disclosure obligations that the FOIA creates. Under the FOIA, the district court had jurisdiction to invoke its equitable powers to require the retrieval of unlawfully removed records, and this was plainly a proper case for the exercise of the court's discretion.

A. The FOIA Applies to Documents That Have Been Unlawfully Removed From Agency Custody

Under the FOIA, federal agencies have an affirmative responsibility to produce all "records" requested by members of the public. 5 U.S.C. § 552(a)(3). The only records exempt from this responsibility are the nine narrow classes of documents specified in subsec-

[72] The Safire FOIA request was made while the transcripts were still in the Department's custody. This request, however, related to a limited portion of the transcripts prepared while Mr. Kissinger was a presidential assistant.

tion (b) of the Act. To insure the fullest possible disclosure of agency records, subsection (c) emphasizes that the Act "does not authorize withholding of information or limit the availability of records to the public except as specifically stated" in these exemptions.

There is no provision of the Act which relieves an agency from disclosing documents which are "records" but happen to be outside the agency's physical custody at the time an FOIA request is made. In the absence of a specific exemption for such documents, the broad disclosure duty created by subsection (c) should plainly require their production.

The Government and Mr. Kissinger urge that paragraph (a)(4)(B) of the FOIA excuses an agency from producing records that are not in its actual possession. Gov. Br. 35; Kiss. Br. 13-14. Under this paragraph, a district court

> "has jurisdiction to enjoin the agency from *withholding* agency records and to order the production of any agency records *improperly withheld* from the complainant." (Emphasis added.)

Records that the agency owns and legally controls, however, can clearly be described as "withheld" whether or not they happen to be stored on agency premises. If an agency receives a request for such records, it has the power to retrieve them and make them available under the Act. Mr. Kissinger, for example, was still Secretary of State when the RCFP requesters sought the transcripts and could easily have returned them to the Department for FOIA processing and review. Thus, when an agency refuses to regain custody over documents that are its records and remain subject to its legal control, it is "withholding" those records in violation of

the Act and the courts have jurisdiction to require an appropriate remedy.

Confirming the plain meaning of the FOIA's statutory language are its underlying policies. The FOIA is based on the premise that the public is entitled to full information about the activities and operations of government agencies. According to the Senate Report, the Act reflects a belief that "the public as a whole has a right to know what its Government is doing." S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). These broad disclosure objectives would be nullified if the Act did not apply to records that remained in the agency's legal control but had been unlawfully removed from its physical custody.

The present FOIA derives from the public information section of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964). Under this earlier legislation, agencies were permitted to withhold information "in the public interest", "for good cause shown", or on the ground that the person seeking the record was not "properly and directly concerned" with the information. Congress revised the FOIA in 1967 to eliminate the broad opportunity for suppressing official records that these standards had created. As the Senate Report summarized the abuses which had occurred under prior law:

> "Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Enumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—'requiring secrecy in the public interest', or 'required for good cause to be held confidential.' " S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

In drafting the new disclosure statute, Congress explicitly sought to limit the discretion of agency officials so there would be no opportunity for suppressing selected documents that were politically or personally sensitive. Thus, Congress provided that "any person" could seek access to any agency record, without showing a specific need for the information it contained. 5 U.S.C. § 552(a)(3). In addition, Congress imposed a sweeping disclosure requirement on the federal agencies which was limited only by nine narrowly drawn exemptions. As the legislative history emphasizes, the statutory scheme rests on a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

The Congressional objective of compelling the broadest possible disclosure is reflected in subsection (c) of the Act which, as indicated, declares that no record may be withheld from the public unless it is within the Act's nine exemptions. The Senate Report's explanation for this provision is revealing: "[t]he purpose of the subsection is to make it clear beyond a doubt that *all materials* of the government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in Section 3." S. Rep. No. 1219, 88th Cong., 2d Sess. 15 (1964) (emphasis added).

In construing the FOIA, this Court has consistently been mindful of its legislative history and stressed the need to interpret its disclosure requirement broadly and its exemptions narrowly. In *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 80 (1973), the Court stated that:

> "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."

In *Department of the Air Force* v. *Rose,* 425 U.S. 352, 361 (1976), the Court reiterated these principles, stressing that the FOIA's

> "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. 'These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c) . . .,' *Mink, supra,* at 79 and must be narrowly construed." (Citations omitted.)

Only last term, the Court again emphasized that the "basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society",[73] and that the Act's "legislative history is replete with references to Congress' desire to loosen the agency's grip on the data underlying governmental decisionmaking."[74] The lower courts have consistently emphasized similar concerns in implementing the Act.[75]

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[73] *NLRB* v. *Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978).

[74] *Chrysler* v. *Brown,* No. 77-922 (April 18, 1979), slip op. 6 n.10.

[75] *See, e.g., Soucie* v. *David,* 448 F.2d 1067, 1080 (D.C. Cir. 1971) ("[t]he policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly"); *Wellford* v. *Hardin,* 444 F.2d 21, 24 (4th Cir. 1971) ("[t]he Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest"); *SDC Development Corp.* v. *Mathews,* 542 F.2d 1116, 1119 (9th Cir. 1976) ("[t]he legislative history of the Freedom of Information Act discloses deep Congressional concern with the ability of the American people to obtain information about the internal workings of their government"); *Vaughn* v. *Rosen,* 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974) (the Act's "exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act").

The FOIA's objective of full disclosure of government information could be easily evaded if the Act ceased to apply once records owned by the agency were removed from its physical custody. Agency employees could simply take home or store with friends documents that they considered politically sensitive or personally embarrassing. Alternatively, such documents could be transferred to sister branches of the government, like the Library of Congress, to which the Act does not apply. Exactly as Mr. Kissinger has done here, stringent restrictions on access could then be imposed which shield important information about governmental activities from public view. Agency officials, unwilling to take action against offending employees or perhaps relieved that damaging information had been suppressed, could simply stand by idly without attempting to retrieve documents that had been improperly removed from agency files.

The practical effect of condoning such stratagems would be to create an additional exemption from the Act for documents that government officials and their superiors, for personal or political reasons, do not wish to disclose. By the simple expedient of removing documents from an agency's physical custody, government officials would be free to engage in precisely the kind of selective withholding of official information that prevailed before the FOIA was enacted and that the Act sought to eliminate. Contrary to the Congressional intent, the agency could refuse access to records that it owns and legally controls even though those records do not fall within the Act's nine exemptions. A "tenth exemption" would now exist for documents that agency officials had the foresight to remove from agency cus-

tody before an FOIA request for their disclosure could be filed.

The circumstances of this case graphically illustrate how the objectives of the FOIA can be circumvented by the unlawful removal of agency records. Before January 1976, when Mr. Kissinger filed interrogatory answers in *Halperin* v. *Kissinger,* the public was unaware that he had monitored and transcribed his White House telephone conversations. Moreover, it was not until November 1976, that the Department first acknowledged that Mr. Kissinger's telephone conversations as Secretary of State had also been transcribed.[76] On October 28, 1976, all of the transcripts were moved from the Department to the Rockefeller estate. However, no public announcement of this removal was ever made. Indeed, statements of a senior Department official implied that Mr. Kissinger did not intend to remove the transcripts until his term as Secretary expired on January 20, 1977. A. 86a. Understandably, therefore, the RCFP FOIA request of January 13, 1977 was based on the premise that the Department still possessed the transcripts. The requesters in fact asked the Department to retain the transcripts until legal proceedings under the FOIA had been resolved. A. 57a-58a.

Thus, this is not a case where FOIA requesters delayed in seeking access to materials that they knew the agency intended to relinquish. Information about the location (and even the existence) of the transcripts was

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[76] So far as requesters are aware, the first acknowledgment by the Department of the transcripts' existence was a statement by Lawrence Eagleburger reported in a *Washington Post* story of November 11, 1976. A. 86a.

withheld from the public, and the requesters had no forewarning that the transcripts would be removed from Department files. If the existence of the transcripts had been disclosed sooner, or if their impending removal had been publicly announced, an FOIA request could have been filed while they were still in Department custody.

Moreover, if the procedures for records disposition prescribed by statute had been observed, the transcripts never would have been removed at all, but would have remained available for production under the FOIA. For this reason, the Department's lack of custody over the transcripts is directly tied to Mr. Kissinger's violation of Department regulations and the Records Disposal Act, and to the Department's refusal to recover the transcripts after receiving requests for their disclosure. The effect of these actions was to deprive the requesters of access to governmental materials which—but for their unlawful removal from Department custody—would have been subject to the Act. The intent of Congress would be defeated if the rights of requesters were extinguished whenever records otherwise covered by the FOIA are removed by agency employees in violation of law and the agency fails to seek their return.

The removal of the transcripts circumvented the objectives of the FOIA in an even more fundamental respect. Under Mr. Kissinger's agreements with the Library of Congress, he alone controls public access to the transcripts. Particular transcripts can be withheld from anyone he considers unacceptable, for any reason which he deems sufficient. A. 44a. Moreover, when access is refused, Mr. Kissinger need not even explain his decisions and there is no forum where those decisions can be reviewed. Nevertheless, Mr. Kissinger's

own access to the transcripts is unlimited, and he and his associates are assured a special working area at the Library where they can be used. A. 43a-44a.

If the transcripts had remained in Department custody, Department regulations would permit Mr. Kissinger to consult them to prepare his memoirs and for other purposes.[77] 5 FAM § 946. However, the transcripts also would be available to other government officials, as well as to historians, political scientists and journalists seeking access under the FOIA. If access were refused, it would thus be on the basis not of Mr. Kissinger's subjective preferences but the narrow standards in the FOIA's nine exemptions. Moreover, any denial of access would be accompanied by an explanation of the agency's rationale and that explanation would be subject to judicial review.

Thus, by removing the transcripts from Department custody, Mr. Kissinger has sought to substitute his own uncontrolled discretion for the FOIA's objective, impartial criteria for disclosing government information. The FOIA was enacted for the precise purpose of preventing government officials from exercising such absolute power over the disclosure of official records. Accordingly, a holding that the removal of the transcripts immunized them from the application of the FOIA would sanction a clear evasion of the Act.

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[77] Since the Department's "senior official rule" would have guaranteed Mr. Kissinger access to the transcripts if they remained in Department files, it would appear that Mr. Kissinger's primary reason for removing them was to prevent access by others. Thus, the Court could conclude that, while Mr. Kissinger may not have anticipated a specific FOIA request when he removed the transcripts, his overall objective was to frustrate public disclosure, and he therefore had an *intent* to evade the purposes of the FOIA.

B. The Cases Have Consistently Recognized That the FOIA Applies to Records That an Agency Owns But Does Not Possess

Prior cases and authorities have consistently recognized that the applicability of the FOIA turns not on whether documents are within the physical custody of an agency but on whether they are agency records and remain agency property despite their location.

In *Ciba-Geigy Corp.* v. *Mathews,* 428 F.Supp. 523, 529 (S.D.N.Y. 1977), for example, the court held "that the goals and purposes of the Act would be served best by imposing a standard which calls for proof that the records were either Government-owned *or* subject to substantial Government control or use." (Emphasis added.) This test clearly presupposes that records owned by a government agency are covered by the Act even if they are not subject to the agency's physical control. Similarly, in *Tax Reform Research Group* v. *I.R.S.,* 419 F.Supp. 415, 425 (D.D.C. 1976), the court held that the fact "[t]hat the agency may no longer be in physical possession of the records . . . is not determinative . . . if the agency knows what records a given request is directed towards, knows where those records are located, and is able to produce them." Indeed, the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23-24 (1967) recognizes that the FOIA applies to records "in the possession *or control* of an agency." (Emphasis added.) Under this standard, records which the agency does not possess are subject to the Act if they are within the agency's legal control.

Mr. Kissinger and the Government rely on cases which indicate that, in response to an FOIA request, an agency has no duty to create records which do not

already exist,[78] procure documents that it does not own,[79] or recreate records that have disappeared.[80] Kiss. Br. 14-17; Gov. Br. 36-38. These cases are not in point. The requesters in this case do not seek documents which no longer exist, which must be specially created, or which the agency has lawfully relinquished to a private party. Instead, they seek documents which are pre-existing, are Department records in every respect but physical location, and were removed from agency custody not in the normal course of government business but in violation of law.

Under these circumstances, the agency retains an enforceable property interest in the documents, and thus exercises legal "control" over them even if it does not actually possess them. In this case, for example,

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[78] This was the situation in *N.L.R.B.* v. *Sears Roebuck & Co.,* 421 U.S. 132 (1975), where the Court held that an agency has no duty to compile information in response to an FOIA request that is not presently incorporated in an agency record. This holding accords with the Attorney General's statement that the Act "imposes no obligation to compile or procure a record in response to a request." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act,* 23-24 (1967).

[79] In *Nichols* v. *United States,* 325 F.Supp. 130 (D. Kan. 1971), *aff'd,* 460 F.2d 671 (10th Cir.), *cert. denied,* 409 U.S. 966 (1972), the plaintiffs sought certain materials relating to the assassination of President Kennedy that the Navy Department had turned over to the Secret Service. No claim was made that this transfer was in any way unlawful and the court understandably held that the Department could not be required to produce materials that it had relinquished to another agency in the normal course of business. 325 F.Supp. at 137.

[80] *Nolen* v. *Rumsfeld,* 535 F.2d 890 (5th Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977), involved records that were missing and, despite the government's good faith efforts to locate them, had apparently disappeared.

the State Department's ownership of the transcripts was not affected by Mr. Kissinger's agreements with the Library of Congress, which he entered into as a private citizen who purported to hold the transcripts as "personal papers." Thus, the Department could have reduced the transcripts to possession at any time by asserting its ownership rights in an informal request to the Library.[81] In the event that the Library failed to comply, the Department would have had an enforceable property interest which entitled it to possession of the transcripts by legal compulsion.[82]

The application of the FOIA to the transcripts is supported by the decision of the Court of Appeals for the District of Columbia Circuit in *Forsham* v. *Califano,* 587 F.2d 1128 (1978), *cert. granted,* No. 78-1118 (May 14, 1979).[83] The raw scientific research data at issue in *Forsham* were created by private universities which were federal grantees. They had always been

[81] Mr. Kissinger was Secretary of State until January 20, 1977, several days after the MAP and RCFP FOIA requests were made. Any Department request during this period for the return of the transcripts would have necessarily had his authority as Department head. Since the "donation" of the transcripts to the Library purported to be for Mr. Kissinger's benefit, the Library undoubtedly would have complied with a Department request for their return which he authorized. Moreover, in view of the Library's willingness to comply with the order of the district court, it is hard to believe it would have resisted an assertion of ownership by the Department made even after Mr. Kissinger was no longer Secretary of State.

[82] Such a lawsuit, it should be stressed, would be based on preexisting property rights and should be distinguished from the situation where an agency exercises compulsory process (*i.e.*, by issuing a subpoena) to obtain custody of materials that it does not already own.

[83] On May 14, 1979, the Court set argument in *Forsham* and this case for the same day.

held at the University of Maryland, outside the physical custody of any federal agency, and were not, and had never been, in the possession of any federal employee. While the Department of Health, Education and Welfare had the right to obtain the data, it had never exercised that right and, thus, the data had never become its "records."[84] By contrast, the transcripts of Mr. Kissinger's telephone conversations were generated by a cabinet officer to aid in transacting official business, were used by other Department employees for this purpose, and remained in the State Department's possession for an extended period before leaving government custody.

In holding that the raw data in *Forsham* were not "records" subject to the FOIA, the court of appeals rested its decision not on the physical location of the data but on the lack of substantial government involvement in their creation and use. As the court determined, the FOIA does not apply to documents produced by a government contractor when there is no "significant government control of [the contractor's] day-by-day operation, or detailed involvement in the planning or execution" of its activities. 587 F.2d at 1138-39. In effect, the court held that such documents were not records covered by the FOIA because they were not, and had never been, government property.

Indeed, all three members of the *Forsham* panel expressly agreed that government participation in the

[84] This factor presents a critical distinction between this case and *Forsham*. It is one thing to require an agency to obtain documents in response to an FOIA request which it has never possessed and have never been its "records"; it is quite another to require the agency to retrieve documents which *are* its "records" and have been unlawfully removed from its custody.

creation and use of disputed documents, and not physical possession, should determine whether the FOIA applies. Judge Leventhal, writing for the court, stated that:

> "We do not suggest that mere physical possession of records by a government agency is the sole criterion for determining whether they fall within the scope of FOIA. Obviously a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee." 587 F.2d at 1136 n.19.

Similarly, Judge MacKinnon's concurring opinion observes that the FOIA applies "to records which belong to the agency *or* are in its possession" (*id.* at 1139) (emphasis added), while Judge Bazelon's dissent stresses that records "need not be located within the physical confines of the agency" so long as the "Government has a substantial degree of control over [their] use and disposition" (*id.* at 1144, 1143).

The lower courts invoked the same rationale in deciding this case. The district court determined that the transcripts of Mr. Kissinger's conversations had been "prepared and transcribed 'in the discharge of his official duties'." Pet. App. 58a. It therefore concluded that they were still "property" of the Department of State and, despite their physical location, were subject to disclosure under the FOIA. The court of appeals agreed with this approach. Pet. App. 49a. Thus, while involving divergent facts, the decisions below in *Forsham* and this case recognize that the FOIA applies to documents which are government property regardless of their physical location. This doctrine is plainly correct and should be adopted by this Court.

C. Retrieval of the Transcripts Under the Freedom of Information Act Is Not Barred by the Federal Records Act

The Government and Mr. Kissinger maintain that the order of the district court had the effect of creating a private cause of action to enforce the Federal Records Act since it required the State Department to repossess documents which had been removed from its custody in violation of the statutory procedures for records disposition. Private citizens, they assert, have no standing under the Act to seek relief against the unlawful disposal of agency records. Such relief, it is argued, can only be sought by the government in an action to recover wrongfully removed records under 44 U.S.C. § 3106. Kiss. Br. 23-29; Gov. Br. 29-34. This contention should be rejected for three reasons: (1) the FOIA alone authorized the lower court to require retrieval of the transcripts; (2) use of the FOIA to recover unlawfully removed records will promote, not weaken, the policies of the Federal Records Act; and (3) a private remedy under the FOIA against the unlawful removal of records will not interfere with legitimate agency record-keeping activities.

1. The FOIA Alone Authorized the District Court To Require Retrieval of the Transcripts

As demonstrated above, the FOIA applies to all records that an agency owns, wherever they are located. Thus, the FOIA—and not any other statute—conferred jurisdiction on the district court to decide whether Mr. Kissinger's removal of the transcripts was lawful. Once the court found that the transcripts had been wrongfully removed, it necessarily followed that they remain Department "records" to which the FOIA applies. It is no bar to relief under the FOIA that the transcripts first had to be returned to the De-

partment before the Act's disclosure requirements could be implemented. This Court has established that a court enforcing the FOIA may call upon its equitable powers to fashion appropriate remedies against violations of the Act.

In *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), three defense contractors engaged in renegotiation proceedings unsuccessfully sought disclosure of certain documents from the Renegotiation Board. Relying on the FOIA, they sued to enjoin renegotiation proceedings before the Board until the documents were produced. The Board argued that, under the FOIA, the only relief that a court could grant was to order the disclosure of withheld documents. The Court disagreed. It held that, in order to protect rights secured under the FOIA, courts may exercise their "inherent capacity to provide appropriate equitable relief." 415 U.S. at 16-20.[85]

If it is permissible to enjoin administrative proceedings to protect rights secured by the FOIA, then the district court was certainly empowered to direct the Department of State to repossess documents that the Department owns and that, in every respect except physical location, are "records" subject to the FOIA.[86]

[85] It is widely recognized that *Bannercraft* provides authority for enjoining agency proceedings in the absence of compliance with the FOIA. *See, e.g., United Telephone Company of Pennsylvania* v. *F.C.C.*, 375 F.Supp. 992 (M.D. Pa. 1974); *Capital Cities Communications, Inc.* v. *N.L.R.B.*, 409 F.Supp. 971 (N.D. Cal. 1976).

[86] Other courts have relied on the *Bannercraft* holding in similar situations. In *Nixon* v. *Sampson, supra*, 389 F.Supp. at 121-22 n. 34, Judge Richey determined that, under *Bannercraft*, he was empowered to issue a declaratory judgment that Mr. Nixon's agreements with GSA were void and his presidential materials were therefore "records" subject to the FOIA.

If no such remedy were available, FOIA litigants would be forced to watch helplessly while government officials withheld important information by removing records from government property or transferring them to branches of the government to which the Act does not apply. The absence of relief in this situation would defeat the objectives of the FOIA.

2. Retrieval Actions Under the FOIA Are Consistent With The Policies of the Records Acts

Since requesters rely on the FOIA to support the district court's order, the Court need not consider whether a private right of action can be implied under the Federal Records Act.[87] That Act would be relevant to the Court's inquiry only if its legislative history or underlying policies evidenced a clear Congressional intent against applying the FOIA to unlawfully removed records. In fact, however, no such intent can be discerned.

Mr. Kissinger and the Government point out that the legislative histories of the Federal Records Act, Records Disposal Act and FOIA do not contain an express statement that FOIA requesters would be able to sue for the disclosure of wrongfully removed records. Kiss. Br. 26-27; Gov. Br. 37. By the same token, however, nothing in these legislative histories indicates that the FOIA was *not* intended to apply to such records. In the face of such silence, it is a logical assumption that Congress expected the courts to adopt a construction of the FOIA which comports most fully with

[87] We do not concede that no such right of action exists, only that the Court need not decide the question. The RCFP Complaint specifically invoked the Records Act as a basis for relief, *see* A. 34a-35a, and thus the Act provides a potential alternative basis for upholding the decisions of the courts below.

its language and basic purpose. We have shown that the goals of the FOIA would be frustrated if records otherwise subject to the Act became immune from disclosure when they were removed from an agency's physical custody. Congress would not have wanted to diminish the public's rights under the FOIA simply because the Government has an independent right to recover unlawfully removed records under a separate statutory scheme.

Equally important, there is no conflict between citizen's suits to retrieve such records under the FOIA and the objectives and policies of the two federal records statutes. The recovery of wrongfully removed records is not merely a matter of internal government housekeeping. The text and legislative histories of the Federal Records and Records Disposal Acts demonstrate that their procedures for records preservation were also intended to benefit interested members of the public.

Under 44 U.S.C. § 2902(5), a primary purpose of records management is "[j]udicious preservation and disposal of records." Moreover, under 44 U.S.C. § 3101, each federal agency must "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency." A major goal of these provisions is to promote public understanding of government activities. Under 44 U.S.C. § 3303, records must be preserved not merely to meet agency needs but because they have "sufficient administrative, legal, research, or other value" to aid informed citizens. According to the House Report, the safekeeping of valuable records was "the primary purpose" of the Records Disposal Act,[88] and the National Study Commission on the Records and Documents of Federal Officials has concluded that the Act is principally motivated by "the interests of preserving records for their legal and research value." [89]

This Court has recognized that "[p]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records" to interested citizens. *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 495 (1975). When records of important agency business are removed from government custody in violation of the statutory scheme for records disposal and preservation, these functions are impaired. Once a valuable record falls into private hands, it becomes inaccessible to journalists and scholars and the supply of revealing information about government activities is reduced. Thus, the unlawful removal of records does not merely harm government agencies; it harms members of the informed public who are the ultimate beneficiaries of the government's recordkeeping decisions under the Records Disposal Act. For this reason, FOIA suits which seek the disclosure of unlawfully removed records contribute to the Act's objectives by insuring that full documentation of official decisions and policies remains in government files.

There is, moreover, reason to question the effectiveness of government retrieval actions under the Federal Records Act in deterring the unlawful removal of rec-

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[88] H.R. Rep. No. 559, 78th Cong., 1st Sess. 1 (1943).

[89] National Commission, *Memoranda of Law* 90 (1977).

ords. 44 U.S.C. § 3106 provides that the Attorney General can file suit to recover records only when an agency head has notified GSA that those records have been wrongfully removed. Agency heads are understandably reluctant to recommend legal action against senior officials who have improperly removed documents. Indeed, when the official in question is himself an agency head, as was Mr. Kissinger, an obvious conflict of interest exists and the filing of a retrieval action is next to impossible.[90] Recognizing these problems, the State Department has acknowledged that, as a practical matter, "the records officer of the Department cannot formally compel compliance by senior officials" with statutory disposal procedures and that the Department's retention of the records of these offi-

[90] Significantly, the unlawful removal of records by high officials was one of the major motivations for enacting the Records Act. According to the *Task Force Report on Records Management in the United States Government* 27 (1948), prepared by the U.S. Commission on Organization of the Executive Branch of the Government:

> "Records removed by officials leaving the public service present a specially critical problem. Many and varied measures to prevent such removal have been adopted by other governments. For the most part, the removal of records is confined to high-ranking officials. As a result, most of the records removed are important or valuable. While it is important that records be defined by law as the property of the Federal Government and there be penalties for unlawful destruction, removal, or falsification of such records, it is equally important that the Congress set up the machinery to forestall such loss, to effect recovery in the event of such loss, and provide that records so removed are recoverable at no cost to the Federal Government. The papers of some Presidents and Cabinet officials have had to be purchased by the Federal Government."

cials "has depended more on persuasion and good faith than on compulsion." A. 207a.[91]

The use of criminal penalties to deter the removal of records is even more problematic.[92] The National Study Commission has observed that "criminal sanctions are seldom applied and few prosecutions have been brought."[93] The Commission concluded that "enforcement of statutes and regulations governing records retention constitutes a major 'problem area,' and enforcement mechanisms besides the 'extreme step' of informing the Department of Justice of possible Criminal Code violations may need to be devised."[94]

FOIA suits for the disclosure of wrongfully removed records can strengthen implementation of the federal records statutes by affording an alternative remedy in cases where the Government is hesitant to invoke civil or criminal sanctions against former officials of great stature and influence. In view of the important role of all three statutes in preserving valuable records for public use and disclosure, a private remedy under the

[91] A paper prepared for the National Commission has commented that a major "reason for the removal of certain papers from the State Department, including large numbers of copies, is that Secretaries and some senior officials will always be concerned with 'protecting' themselves from future exposure or embarrassment." According to the author, it "is very doubtful that any action taken by the State Department short of criminal prosecution for removal of papers would change this situation." A. Nelson, *Foreign Policy Records and Papers, supra,* at 64.

[92] Among the criminal statutes which potentially apply to the unlawful removal of records are 18 U.S.C. § 641, 18 U.S.C. § 2071 and 18 U.S.C. § 798.

[93] National Commission, *Public Hearings Background Memorandum* 37 (1977) (footnote omitted).

[94] *Id.* (footnote omitted).

FOIA would enhance—not weaken—the overall effectiveness of the records management scheme created by Congress.

3. FOIA Retrieval Actions Will Not Cause Judicial Intrusion Into Agency Recordkeeping Activities

The Government and Mr. Kissinger suggest that the application of the FOIA to unlawfully removed records will result in judicial intrusion into agency recordkeeping functions and undermine orderly management of agency record programs. Kiss. Br. 24; Gov. Br. 34. These fears are groundless. Retrieval actions under the FOIA will be rare and, if recordkeeping considerations dictate judicial restraint in a particular case, the courts will decline to exercise their equitable powers under the FOIA.

The FOIA applies to "records" in the custody or control of an agency. 5 U.S.C. § 552(a)(4)(B). A document created to facilitate agency business but removed from its custody in accordance with statutory disposal procedures is no longer owned or possessed by the agency and is thus not a "record." Since such a document has been removed *lawfully,* it is not agency property and the agency could not be compelled to retrieve it in response to an FOIA request.

The FOIA would authorize retrieval only when a document has been removed from agency custody in disregard of statutory procedures and as a result of the unauthorized acts of individual agency officials. The removal of such a document does not reflect a determination by the agency that the document is no longer needed for agency business. Since the statutory procedures for such recordkeeping determinations have been bypassed, the agency has never considered

whether the document should be retained but merely acquiesced in the unlawful acts of its employees. In this situation, judicial relief under the FOIA would not usurp statutory recordkeeping responsibilities; the agency has defaulted on those responsibilities to start with.

The availability of FOIA relief in these limited circumstances would impose negligible burdens on the government. The Records Disposal Act, augmented by regulations of GSA and individual agencies, contains a clearcut and comprehensive scheme for reviewing records that agencies wish to discard and determining whether they are necessary for the transaction of government business. Virtually all unneeded records are —or should be—removed from agency custody in accordance with these requirements and agency decisions respecting these records could not be reviewed under the FOIA. The Act would apply only when—as in this case—applicable procedures for records disposition have been ignored, the agency has made no effort to recover wrongfully removed documents, and a request for the documents is filed under the FOIA. Invoking the FOIA in this very uncommon situation will not increase the duties of federal agencies under the FOIA or otherwise impede their operations.

On those rare occasions where a remedy under the FOIA would interfere with agency recordkeeping functions, the district courts would be justified in declining to invoke their equitable powers under the Act.[95] For example, equitable relief might be inappro-

[95] The existence of equitable jurisdiction under the FOIA to order the return of unlawfully removed records does not mean that such a power must be exercised in every case. For example, in *Renegotiation Board* v. *Bannercraft Clothing Co., supra,* this

priate where the FOIA requesters knew that documents would be removed but delayed unreasonably in seeking their disclosure; where substantial time has passed after the documents' removal before an FOIA request was filed; or where the agency has provided a compelling explanation for its failure to institute a retrieval action and demonstrated that retrieval of the documents would harm government interests.

In this case, however, the district court's decision that the equities favored the granting of relief is unassailable. The RCFP requesters were not guilty of any delay in seeking disclosure of the transcripts. Mr. Kissinger's monitoring of his State Department telephone conversations first became known in late 1976, and the requesters had no reason to suspect that the transcripts would be removed from Department custody nearly three months before Mr. Kissinger's term as Secretary expired. Thus, the requesters sought access to the transcripts as promptly as circumstances permitted.

Equally important, the Government has never offered any reason to justify its failure to retrieve the transcripts or argued that such retrieval would harm its interests. Indeed, the only plausible explanation for the Government's inaction is its evident reluctance to institute judicial proceedings—alleging the unlawful removal of State Department property—against a former Secretary of State of Mr. Kissinger's undeniable prestige. While this reluctance may be understandable from the Government's standpoint, it vividly dem-

Court held that, while the lower courts could exercise their equitable powers under the FOIA to enjoin renegotiation proceedings, such relief would be inappropriate in the particular case at hand.

onstrates why concerned citizens should have an independent right to sue under the FOIA for the disclosure of unlawfully removed records.

III.

THE TRANSCRIPTS RECORDING MR. KISSINGER'S WHITE HOUSE CONVERSATIONS SHOULD BE RETURNED TO THE DEPARTMENT FOR FOIA REVIEW AND DISCLOSURE

In all important respects, the transcripts that originated when Mr. Kissinger was Secretary of State are identical to the transcripts of his telephone conversations as Assistant to the President. Both sets of documents record the transaction of official business, were used to assist Mr. Kissinger in discharging his governmental duties, were produced by government employees, and were stored on government premises. Moreover, as Mr. Kissinger prepared to leave the government, he removed both sets of transcripts from Department custody and "donated" them to the Library of Congress. In each instance, the basis for these actions was the erroneous theory that the transcripts were Mr. Kissinger's personal papers, and neither set of transcripts was subjected to the procedures for records disposition required by the Records Disposal Act.[96]

Because of these considerations, the lower courts held that the State Department transcripts were official

[96] The White House transcripts were also subject to the Records Disposal Act's scheme for the disposition of official records. 44 U.S.C. § 2901 incorporates the definition of agency in 40 U.S.C. § 472(a). This definition, in turn, applies to "any executive department or independent establishment in the executive branch of the Government". The White House would appear to qualify as an "agency" under this definition.

records that Mr. Kissinger had unlawfully removed from Department custody. This conclusion would have been equally proper for the White House transcripts as well. Indeed, one of the RCFP requesters, William Safire, sought disclosure of portions of the White House transcripts *before* they left the Department and, thus, they were actually in the Department's possession when a request for FOIA access was made.

The only difference between the two groups of transcripts is that one concerns the affairs of the State Department while the other reflects the affairs of the President and the NSC. For three reasons, however, this factor was not sufficient to exempt the White House transcripts from the State Department's disclosure responsibilities under the FOIA: (1) an agency which possesses documents that record the transaction of official business cannot withhold those documents under the FOIA merely because they were originated elsewhere in the government; (2) documents produced in the White House Office of the President lose their immunity from the FOIA when they are transferred to other agencies and the President does not exercise any further control over their use; and (3) the NSC is an "agency" to which the FOIA applies and transcripts that reflect Mr. Kissinger's NSC duties would be covered by the Act even if they had stayed at the White House.

A. The FOIA Applies to Records That Originate Elsewhere in the Government

5 U.S.C. § 552(a)(3) provides that "*each* agency, upon any request for records which . . . reasonably describes such records . . . *shall* make the records promptly available to any person" (emphasis added). This provision does not limit an agency's disclosure obligations to documents which were created in connection with its own business and exclude documents that the agency acquired from other parts of the government. Rather, it applies to *all* "records" in the agency's possession regardless of their source.

The legislative history of the FOIA describes agency disclosure responsibilities in similar terms. The floor debates on the Act emphasize that it was intended to enable citizens "to know the facts about the operation of their government" [97] and "to be fully informed about the policies and activities of the Federal Government." [98] Moreover, the Senate Report stresses that the Act requires the disclosure of "*all materials* of the government" unless specifically withheld under one of the Act's nine exemptions. S. Rep. No. 1219, *supra,* at 15 (emphasis added). The plain implication of these statements is that an agency must disclose all documents in its possession which constitute "records" of the federal government, whether they originated in connection with the agency's business or reflect the affairs of some other government entity and later entered agency custody.

Decisions of the lower courts uphold this principle. For example, in *Tax Reform Research Group* v. *IRS,* 419 F.Supp. 415 (D.D.C. 1976), the court required the IRS to disclose documents originated at the White House and later provided to the IRS by the Department of Justice. To deny an FOIA request merely because records were originated at some other agency,

[97] 112 Cong. Rec. 13657 (1966) (remarks of Rep. Reid).

[98] 112 Cong. Rec. 13648 (1966) remarks of Rep. Faschell).

the court determined, would frustrate the objectives of the Act:

> "To hold that a document received by an agency and actually used by it in agency decisionmaking is not an agency record for purposes of the Act simply because the document was not generated by that agency . . . would seriously undermine one of the central purposes of the Act; to allow the public to become informed of the bases for agency decisions and actions. Such a holding would contradict the mandates of Congress that documents be disclosed unless specifically exempt and that the balance should be tipped in favor of disclosure in questionable situations." 419 F.Supp. at 425.

The Government and Mr. Kissinger suggest that this principle does not apply to the White House transcripts because, even though stored in Mr. Kissinger's State Department office, they were never actually in the Department's "custody." To support this claim, it is pointed out that Mr. Kissinger kept the transcripts in files marked "personal" and the Department did not contest their "personal" status. Gov. Br. 54; Kiss. Br. 52. As the Government itself concedes, however, the transcripts were owned by the government for the duration of Mr. Kissinger's term as Secretary of State. Gov. Br. 22. Thus, while the White House transcripts were stored on its premises, the Department exercised control over them and could have produced them under the FOIA at any time.[99] Moreover, when the White

[99] The Department in fact exercised its control over the White House transcripts on at least two occasions—when Department officials reviewed transcripts sought by Mr. Safire to determine if they contained classified information (A. 259a) and when the Undersecretary of State for Management prepared extracts of the White House transcripts for inclusion in NSC files (A. 248a).

House transcripts were located in his Department office, Mr. Kissinger was not a private citizen, but Secretary of State, exercising all of the State Department's governmental powers. Surely, documents relating to official business which are stored in a Department Secretary's files do not cease to be in that Department's control merely because he mistakenly regards them as his personal papers.

Mr. Kissinger and the Government also assert that the White House transcripts were never in the Department's custody because there is no evidence that they were ever used to facilitate Department functions. Gov. Br. 53; Kiss. Br. 50-51. The significance of this factor is highly debatable. Documents relating to government business and in the possession of an agency should not be exempt from FOIA disclosure merely because they were never actually used in that agency's operations. In this event, documents that reveal information about government activities could be withheld from the public simply because they happened to be kept by an agency that had never used them to conduct its own affairs. This result cannot be squared with the purposes of the FOIA.

To the extent that the Department's use of the White House transcripts is at all relevant, moreover, the record is insufficient to decide the issue. The significance of this factor only emerged after the court of appeals emphasized it in its decision. Pet. App. 50a. Accordingly, no evidence was ever presented in the district court which bears on the point one way or the other.[100]

[100] The most logical inference from the facts which *are* supported by the record is that the Department *did* use the White House transcripts. If the transcripts had no connection with Mr. Kissin-

For this reason, if the Court determines that the issue has any bearing on the status of the White House transcripts under the FOIA, it should remand this portion of the case for discovery and perhaps an evidentiary hearing on the extent to which the State Department used these transcripts in conducting its business.

B. The Transcripts Ceased to Be Immune From the FOIA as Records of the President's White House Office When They Left the White House

Mr. Kissinger also contends—and the court of appeals agreed—that the transcripts were not subject to FOIA disclosure because the Act does not apply to records of the President's White House Office. While this argument might be valid if the transcripts had remained in the White House, it ceased to apply when they were relinquished to the Department of State.

The Conference Report for the 1974 FOIA Amendments indicates that the term "agency" does not include the President's White House Office—*i.e.*, "the President's immediate personal staff or units in the

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ger's duties as Secretary of State, it would have been unnecessary to store them on Department premises; they would have been left at the White House or removed from government custody altogether. Moreover, Mr. Kissinger has consistently conceded that the transcripts were used by his Department aides for a variety of job-related purposes (A. 244a-245a), and it is logical to conclude that this examination included the White House transcripts as well as those generated by Mr. Kissinger at the State Department. Indeed, at the direction of the Department's Legal Adviser, extracts were prepared upon Mr. Kissinger's retirement not merely of the transcripts from his State Department period, but of those from his White House period as well. This extracting process was conducted by the Undersecretary of State for Management and purported to be based on requirements imposed by Department regulations. A. 248a.

Executive Office whose sole function is to advise and assist the President." H.R. Rep. No. 93-1380, 93rd Cong., 2d Sess. 15 (1974). One lower court, accordingly, has held that the FOIA does not apply to the White House Office of the President. *Nixon* v. *Sampson, supra,* 389 F.Supp. at 147. *Cf. Soucie* v. *David, supra,* 448 at 1074-1076.

This case, however, does not involve records of a presidential advisor which were retained in the White House for the immediate use of the President and his aides. When Mr. Kissinger resigned as Assistant to the President and became Secretary of State, the transcripts were moved from the White House to the Department and, for an extended period, were filed in Mr. Kissinger's Department office. Moreover, after the transcripts left its custody, the White House imposed no restrictions on their use and never indicated that it expected them to be returned. In short, any interest that the White House might have asserted in the transcripts was surrendered when they left White House custody, and control over their use and disposition effectively passed to the Department of State.

While the 1974 Amendments to the FOIA were under consideration by Congress, the Department of Justice argued that the White House Office should be exempt from the Act because its employees "are among a President's most trusted advisors and the need for those persons to speak candidly on highly confidential matters is obvious." H.R. Rep. No. 93-876, 93d Cong., 2d Sess 20 (1974). This rationale has no application to documents which originate in the White House Office but are later circulated to other agencies without any effort by the President to exercise continuing control or maintain their confidentiality. Under such

circumstances, the justification for exempting records produced by the White House Office from the FOIA is no longer relevant. Those documents should therefore be treated like all other records of official business to which the FOIA applies.[101]

A similar analysis was followed by the Court of Appeals for the District of Columbia Circuit in *Goland* v. *CIA*, No. 76-0166 (May 23, 1978), *pet. for cert. pending*, No. 78-1924, which involved an FOIA request for the transcript of a House of Representatives committee hearing that had been loaned to the CIA. Because the committee had taken elaborate precautions to assure that its hearings were conducted in secrecy and the transcript remained confidential, the court determined that it remained "under the control of and continues to be the property of the House of Representatives." Slip op. 12-13. As the court elaborated, "the document is in no meaningful sense the property of the CIA; the Agency is not free to dispose of the Transcript as it wills, but holds the document, as it were, as a 'trustee' for Congress." *Id.* at 13. The court cautioned that it reached this result only because "Congress' intent to retain control of the document is clear" and observed that "[o]ther cases will arise where this intent is less plain." *Id.* at 14.

Here, in contrast to *Goland*, the White House did not instruct the State Department to maintain the secrecy of the transcripts or reserve its right to seek their return. Thus, the White House expressed no intent to retain control of the transcripts, and ownership passed to their new custodian, the Department of State. When possession and control of documents recording the transaction of official business shift from an entity which is not subject to FOIA to one which is, the documents become "records" to which the Act applies and the agency which acquires the documents should become responsible for their disclosure.

[101] Since it is normal practice for White House records to be disseminated to other agencies, a holding that such records are indefinitely immune from FOIA disclosure would seriously erode the obligations created by the Act.

C. At a Minimum, Transcripts Reflecting Mr. Kissinger's NSC Duties Are Subject to the FOIA

Even if the transcripts preserved their status as White House records after they were moved to the Department of State, they would not be immune from FOIA disclosure in their entirety. To the extent that particular transcripts were records of the NSC rather than the White House Office, the Act would still apply.

In *Soucie* v. *David, supra*, the court of appeals held that the FOIA applied to the Office of Science and Technology because it was part of the Executive Office of the President. 448 F.2d at 1075. The court suggested that the National Security Council had a similar status, *id.*, at 1074, a view that this Court apparently shared in *EPA* v. *Mink*, 410 U.S. 73 (1973), where the FOIA was applied to a report prepared by the National Security Council system. The 1974 Amendments to the FOIA explicitly define "agency" to include the Executive Office of the President, *see* 5 U.S.C. § 552 (e), and the legislative history of these amendments cites the NSC as an executive agency to which the Act applies. H.R. Rep. No. 93-876, *supra*, at 8.

The *United States Government Manual* for Mr. Kissinger's White House years identifies the Assistant

to the President For National Security Affairs as the ranking official of the NSC. A. 268a, 270a, 272a, 273a, 274a, 275a, 276a. Moreover, charts describing the NSC's organization make it clear that the President's Assistant for National Security Affairs is responsible for directing the activities of the NSC's standing committees of foreign policy officials from different federal agencies and its permanent staff of national defense analysts. A. 278a-279a.

The many published accounts of Mr. Kissinger's White House years indicate that he was an unusually active NSC head, devoting considerable time and energy to overseeing the Council's policy deliberations and research projects.[102] Reflecting the close nexus between Mr. Kissinger's White House duties and the NSC's operations, for example, is the fact that extracts from the White House transcripts were deposited not with the White House Office but in NSC

[102] In *The Illusion of Peace* 12 (1978), Tad Szulc has described Mr. Kissinger's relationship to the NSC as follows:

> "Redesigning the mechanism of the National Security Council, ostensibly the government's highest-ranking policy-making group in the area of foreign policy, Kissinger created seven NSC committees to develop and study new policies, and he assigned himself to chair six of them. As the president's assistant for national security affairs, Kissinger not only controlled the council itelf, sitting at Nixon's elbow, but from the first day took charge of every move within the NSC mechanism."

Similar descriptions of Mr. Kissinger's NSC activities are contained in M. Kalb and B. Kalb, *Kissinger* 78-91 (1974) and B. Mazlish, *Kissinger: The European Mind In American Policy* 223-227 (1976). For historical studies of the NSC which discuss the roles of both Mr. Kissinger and his predecessors, *see* R. Falk, "The National Security Council Under Truman, Eisenhower and Kennedy", 79 Political Science Quarterly 403-434 (September 1964), and D. Hall, "The 'Custodian-Manager' of the Policymaking Process", 2 *Commission on the Organization of the Government for the Conduct of Foreign Policy* 100-119 (1975).

files. A. 248a.[103] Accordingly, a sizable number of the White House transcripts record conversations in which Mr. Kissinger was performing his duties as the NSC's chief administrator, not furnishing advice to the President. At a minimum, transcripts of conversations in which Mr. Kissinger was coordinating and controlling the affairs of the NSC are subject to disclosure under the FOIA.

The court of appeals, however, held that cross-petitioners had not qualified for disclosure of NSC-related transcripts because they had never filed an FOIA request with the NSC. Pet. App. 50a. This approach is not only illogical, it conflicts with both the text of the FOIA and other decisions of the lower courts implementing the Act.

5 U.S.C. § 552(a)(6)(B)(iii) provides that the deadline for answering FOIA requests may be extended for 10 days to permit consultation "with another agency having a substantial interest in the determination of the request . . . ." Underlying this provision is an expectation that the agency with physical custody of requested documents would have primary responsibility for disclosing them under the FOIA and, where necessary, the originating agency would participate by offering advice and guidance. Indeed, any other procedure would be grossly inefficient. The FOIA requester who had the misfortune to seek records created elsewhere in the government would be forced to file an additional request with the originat-

[103] The NSC in fact has a remarkably complete and formal set of files which is maintained separately from the files of the White House Office. A. Nelson, *Foreign Policy Records and Papers, supra,* at 21-23.

ing agency, which would then have to reclaim possession of the documents before the request could be acted upon. Thus, the lower courts have consistently held that records of one agency which are in the custody of another may be obtained by an FOIA request to the agency which possesses them. *Tax Reform Research Group* v. *IRS, supra; Nixon* v. *Sampson, supra,* 389 F. Supp. at 145-146.

In this case, the State Department was the last agency with custody and control of the White House transcripts. An FOIA request to the Department was therefore a logical first step in obtaining their disclosure. If this Court determines that the FOIA applies to the transcripts, the most efficient review procedure will be to assemble all of the transcripts in one location where a single group of archivists can organize them into their respective categories and determine the extent to which they fall within the FOIA's exemptions. Returning all the transcripts to the Department is the best way to achieve this objective. While NSC representatives undoubtedly should be involved in the review process, it makes no sense to postpone screening the White House transcripts until requesters have made the formal gesture of filing an FOIA request with the Council.[104] If the NSC transcripts are records

[104] At this late stage of the case, filing an FOIA request with the NSC will be singularly unproductive. The threshold issues relating to the White House transcripts—whether they are "records" and, if so, whether the Act still applies to them despite their present location—will already have been resolved by this Court's decision. On the other hand, since the NSC does not now have access to the transcripts, it is in no better position than the State Department to make judgments concerning the application of the FOIA's exemptions.

subject to the FOIA, a request to the last agency which possessed them should be sufficient to invoke the Act.[105]

IV.

THE PROCESSING AND DISCLOSURE OF THE TRANSCRIPTS PURSUANT TO THE FOIA WILL NOT VIOLATE MR. KISSINGER'S PRIVACY RIGHTS UNDER THE CONSTITUTION

Mr. Kissinger also attacks the district court's decision on the ground that it unconstitutionally invades

[105] Mr. Kissinger has suggested that, in the proceedings below, cross-petitioners did not focus on his NSC duties in a timely manner and, hence, the issue was inadequately considered by the lower courts. Kiss. Br. 52-53. This contention is misleading and inaccurate. By seeking access to the transcripts of Mr. Kissinger's conversations as Assistant to the President, cross-petitioners' Complaint necessarily encompassed conversations relating to the NSC; as noted in the text, the Assistant to the President for National Security Affairs has traditionally functioned as the Council's chief executive.

Moreover, when Mr. Kissinger opposed their motion for summary judgment by arguing that the White House Office is exempt from the FOIA, cross-petitioners responded by pointing out that the Executive Office, including the NSC, is not within this exemption. As a result, both before and after the parties' cross-motions for summary judgment were decided by the district court, the special status of the NSC transcripts was briefed thoroughly by cross-petitioners and Mr. Kissinger. *E.g.,* Plaintiffs Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, in Opposition to Defendant Kissinger's Motion for Summary Judgment and in Opposition to the Government's Request for Production of Documents, August 8, 1977, at 45-46; Reply Memorandum of Points and Authorities by Defendant Henry A. Kissinger in Support of His Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, August 22, 1977, at 12-13. The issue of the NSC-related transcripts was then briefed again in the court of appeals by all parties, including the Government, and decided on its merits. Thus, the application of the FOIA to transcripts relating to Mr. Kissinger's NSC duties was raised in a timely manner below and is properly before this Court now.

his privacy rights by requiring State Department records officers to obtain and review transcripts of conversations that concern personal matters. Kiss. Br. 45-48. This argument is insubstantial.

As a record of Mr. Kissinger's telephone conversations during each working day, the transcripts relate predominantly to official business. Mr. Kissinger was an important government official with numerous responsibilities, and he undoubtedly devoted little official time to arranging his social life, communicating with his family or managing his finances. It is clear that the telephone conversations of a high government official while discharging his government duties are not constitutionally protected from public disclosure. In *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977), this Court held that "the public has a recognized interest" in documents which concern official business and such documents are not encompassed by any right of privacy. 433 U.S. at 459, 462. This conclusion accords with the long-established principle that the right of privacy "does not extend to matters of public interest or to persons properly in the public eye . . ." [106]

In addition, as demonstrated above, the transcripts were the property of the government during Mr. Kissinger's term as Secretary of State [107] and, under his

[106] *Dodd* v. *Pearson,* 279 F.Supp. 101, 105 (D.D.C. 1968) *aff'd in part* and *rev'd in part on other grounds,* 410 F.2d 701 (D.C. Cir. 1969), *cert. denied,* 395 U.S. 947 (1969). *See also, e.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Garrison* v. *Louisiana,* 379 U.S. 64 (1964); *Cox Broadcasting Corp.* v. *Cohn, supra.*

[107] This conclusion may even apply to conversations relating to Mr. Kissinger's personal affairs. Such conversations were monitored and transcribed in order to insure that there were full records of all discussions pertaining to official business. A. 245a. Thus, although not involving government matters as such, the transcripts of personal conversations were created as part of Mr. Kissinger's official duties and, for this reason, quite possibly qualify as government property.

agreements with the Library of Congress, Mr. Kissinger has now surrendered to the United States any ownership interest which he once claimed to have. It is settled that, where a person is neither the owner of property nor the possessor of it, he cannot validly claim that its seizure by the government violates his Fourth or Fifth Amendment rights. *See, e.g., Brown* v. *United States,* 411 U.S. 223, 229 (1973); *United States* v. *White,* 322 U.S. 694, 699 (1944); *Bellis* v. *United States,* 417 U.S. 85 (1974); *United States* v. *Haden,* 397 F.2d 460, 465 (7th Cir.) *cert. denied,* 396 U.S. 1027 (1968).[108] Moreover, as the Court emphasized in *Wilson* v. *United States,* 221 U.S. 361, 380 (1911), even actual possession is not a basis for resisting inspection when the government seeks to examine "public records and official documents, made or kept in the administration of public office . . ."

As Mr. Kissinger points out, the district court required the return of all the transcripts to the Department so Department records officers could separate those few transcripts that are purely personal from

[108] In *Gibson* v. *United States,* 149 F.2d 381, 384 (D.C. Cir. 1945), *cert. denied,* 326 U.S. 724 (1945), the court stated: "[T]he settled doctrine is that objection to evidence obtained in violation of [the Fourth Amendment] may be raised only by one who claims ownership in or right to possession of the premises searched or the property seized . . . ."

the vast majority that are official in nature.[109] However, the need for this procedure was created by Mr. Kissinger himself, who found it more convenient to monitor both personal and business conversations and intermingle the resulting transcripts than to store the two classes of documents separately. Having decided to mix personal and official transcripts indiscriminately, Mr. Kissinger can hardly complain about a screening procedure designed to segregate government-related materials.[110]

The legality of the procedure required by the district court is conclusively established by this Court's decision in *Nixon* v. *Administrator of General Services, supra,* which holds that GSA could take possession of the complete materials of Mr. Nixon's Presidency in order to separate personal from official documents:

> "Thus, the Act 'is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-private documents and materials related to government objectives. The processing contemplated by the Act—at least as narrowed by carefully tailored regulations—represents the least intrusive manner in which to provide an adequate level of promotion of government interests of overriding importance.' We agree with the District Court that the Act does not unconstitutionally invade appellant's right of privacy." 433 U.S. at 456-57 (citation omitted).

[109] Mr. Kissinger objects to the district court's order on the ground that it requires the Department to repossess portions of the notes that relate to purely personal matters and makes no provision for the return of these materials to him. Kiss. Br. 46-47. At no time in this litigation, however, has Mr. Kissinger asked for this relief. Requesters have never sought disclosure of transcripts of purely personal conversations and would not object to a procedure which provides for the return of these transcripts to Mr. Kissinger after their review by State Department records officers.

[110] Under the common law, one who causes his personal property to be intermingled with the property of another may lose the property entirely. Brown, *Personal Property* §§ 30-34 at 64-76 (2d ed. 1955). Also a trustee who intermingles property of the trust with his own must suffer any loss resulting therefrom. II Scott, *Trusts* §§ 179.1 at 1430-31 (3d ed. 1967).

As in *Nixon,* only review of the complete transcripts by Department records officers can assure that those portions which reflect official business are returned to the Department in their entirety.[111] The alternative—permitting Mr. Kissinger himself to segregate official from personal materials—would create a serious risk that transcripts which reflect government business will never be processed under the FOIA. Moreover, the archival screening required by the district court will result in a minimal invasion of Mr. Kissinger's privacy. The few portions of the transcripts that are purely personal in character will undoubtedly be withheld from disclosure and, thus, will never be publicized

[111] A similar procedure was also upheld by this Court in *Department of the Air Force* v. *Rose,* 425 U.S. 352 (1976). That case involved an FOIA request for certain case summaries of honor and ethics hearings concerning cadets at the Air Force Academy. The Court agreed with the Air Force that "the disclosure of these summaries implicates . . . privacy values." 425 U.S. at 376. It therefore directed the district court to edit the case summaries to delete personal information—recognizing that this information would necessarily be disclosed to the district judge. To the objection that this disclosure would itself constitute an invasion of privacy, the Court responded that "the in camera procedure [ordered] will further the statutory goal of . . . a workable compromise between individual rights 'and the preservation of public rights to Government information.' " 425 U.S. at 381.

outside of the narrow circle of State Department officials charged with reviewing them.[112] And since Mr. Kissinger routinely circulated the transcripts to other Department employees and allowed them to be reviewed by Mr. Eagleburger so he could prepare extracts, the additional screening required by the district court will be no more intrusive than the screening that occurred when the transcripts were in Department custody. Under these circumstances, the injury to Mr. Kissinger's privacy will be *de minimis* and can easily pass Constitutional muster.

[112] In addition, the district court's order provides that, before any portions of the transcripts can be disclosed to the public, they must be reviewed by Mr. Kissinger himself, who will then have an opportunity to enjoin their release under FOIA exemption 6, which forbids "clearly unwarranted invasions of personal privacy." As discussed in n. 25 *supra*, we question whether this procedure is permissible under the FOIA. Nevertheless, the Court should be aware of the additional protection it affords to Mr. Kissinger's privacy interests.

CONCLUSION

The decisions of the courts below properly required the return of the transcripts of Mr. Kissinger's telephone conversations as Secretary of State to the State Department for review and processing under the FOIA. The Court should therefore affirm this portion of the decisions below. However, the lower courts erred in refusing to grant identical relief in connection with the transcripts of Mr. Kissinger's telephone conversations as Assistant to the President. Accordingly, the Court should direct the district court to enlarge its order so it applies the FOIA to these transcripts as well.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER,
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and
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS MILITARY AUDIT PROJECT, *et al.*

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IN THE

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OCTOBER TERM, 1978

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HENRY A. KISSINGER,

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REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS MILITARY AUDIT PROJECT, *et al.*

QUESTIONS PRESENTED

1. Was petitioner's removal from the Department of State of papers recording Departmental business a viola-

tion of his fiduciary duty, in circumstances of conflict of interest, and wrongful?

2. Did the Department of State retain its right to possession of such papers despite such a wrongful removal?

3. Did the district court have equitable power to order the return to the Department of State of records wrongfully removed, in order to effectuate the policy of the Freedom of Information Act (FOIA) and in aid of its jurisdiction to determine if records were improperly withheld?

4. Are records of conversations of the Secretary of State in which public business was transacted agency records within the definition of the FOIA?

5. Does processing by State Department officials under the FOIA, with petitioner having an express right to oppose release of private matter, violate a constitutional right of petitioner?

STATEMENT OF THE CASE

FACTS

Petitioner while Secretary of State had transcripts made of his telephone conversations (the Notes). Much of the material in the notes records public business. In January 1976 a Freedom of Information request was made for certain of the notes. The Department denied the request. In October 1976 petitioner removed the notes from his State Department office and shipped them to Vice-President Rockefeller's home in New York. In November 1976 petitioner's subordinate, the Legal Adviser, wrote a memorandum to petitioner stating that in his view the notes were petitioner's personal property and not agency records. He advised nevertheless that if

government business were recorded in the notes, such portion should be extracted for the Department's records.

Petitioner had one of his aides, Lawrence Eagleburger, a career Department official, make extracts. On December 24, 1976, petitioner executed an agreement transferring the notes to the Library of Congress. The agreement provides that petitioner and persons he personally designates or approves would have exclusive access to the notes for 25 years.[1]

On December 28, 1976, respondent[2] Military Audit Project, *et al.*, hand delivered its first Freedom of Information Act request for the notes to the State Department. The same day petitioner caused the notes to be shipped from the Rockefeller home to the Library of Congress. On January 18, 1977, the Department of State denied respondent's FOIA request, not only for the notes but also for copies and extracts the Department had retained. On January 20, 1977, petitioner left the office of Secretary of State. The Department thereafter denied respondent's FOIA appeal.

PROCEEDINGS

Respondent filed suit under the FOIA against the Department, the Library and petitioner, asking for an order granting access to the records and enjoining defendants from withholding them. A. 20a. A later request by the Reporters' Committee for Freedom of the Press, *et*

[1]The agreement recites that the donation is to the United States. The intention was a transfer to the Library for petitioner's exclusive use. Petitioner could have left the notes in the State Department if he wished to donate them to the "United States."

[2]In this brief "respondent" refers to Military Audit Project, et al. Reference to plural "respondents" refers to Military Audit Project, *et al.* and the Reporters' Committee, *et al.*, collectively.

al., also had been denied, on January 28, 1977. The Reporters' Committee also filed suit.

In the course of the proceedings respondent represented that it sought only those portions of the notes recording government business, not personal matters. Later in the proceedings the Department of State agreed not to press further its denial to respondent of access to the extracts made by Mr. Eagleburger. The extracts are to be processed under the district court's order once the present stay of that order is dissolved.

Respondent Military Audit Project, *et al.* is a party only in No. 78-1088, the petition of former Secretary Kissinger to reverse the decision of the district court and court of appeals holding that the FOIA reaches notes of his tenure as Secretary of State. Respondent is not a party to the cross-petition of the Reporters' Committee to reverse the decision that the FOIA does not reach notes of petitioner's tenure as National Security Adviser.

THE RULINGS BELOW

The district court held that the FOIA covered agency records wrongfully removed from the agency. Pet. App. 53a-55a. It held that the records sought here were agency records wrongfully removed from the State Department. *Id.* 55a-58a. It ruled that therefore they should be returned to the Department of State. *Id.* 58a.

The district court then ordered the Library of Congress to return the documents to the Department of State, to determine the extent to which disclosure was required by the FOIA. *Id.* 60a. The district court ordered that petitioner and any other persons affected should have the opportunity to object to disclosure of any material they deemed exempt on privacy grounds. *Id.* 61a. The district court retained jurisdiction of the case for the purpose

of overseeing compliance with its order. *Id.* The order has been stayed pending review by this court.

On petitioner's appeal the Court of Appeals affirmed *per curiam*. Neither the Department of State nor the Library of Congress had appealed.

SUMMARY OF ARGUMENT

The principal issue before the Court on the merits is not implication or creation of a private remedy of retrieval of removed agency records. It is, whether records removed from an agency in the circumstances of this case may still be subject to the FOIA after removal and hence subject to the reach of a district court, once its jurisdiction is invoked by a requester of documents whose request was denied. 5 U.S.C. § 552(a)(3), (4)(B).

I.

The district court had subject matter jurisdiction of the case and respondents stated a claim for relief under the FOIA. Respondent MAP's complaint invoked the district court's jurisdiction to decide whether the Department of State's denial of access to the records was an improper withholding under the FOIA. By alleging the Department's denial of access to documents which admittedly existed the complaint stated a claim for relief.

II.

The district court correctly held that petitioner's removal of the notes from the Department of State was wrongful. Pet. App. 55a, 58a. Petitioner was Secretary of State and head of the Department when he removed the notes. By statute he was custodian of the Department's papers. By removing the notes he favored his

personal interests in conflict with and over the interests of the Department. This violated his fiduciary duty as a government official.

Moreover, petitioner's wrongful act did not deprive the Department of lawful possession of the notes. As Secretary of State and a fiduciary he held the notes, and exercised dominion and control of the notes in the hands of his bailee the Library of Congress. Thus the Department of State had possession of the notes as a matter of law when respondent's request was received on December 28, 1976, and when it was denied on January 18, 1977; both dates on which petitioner was still Secretary of State. The notes are impressed with a constructive trust in favor of the Department. The Department has possession, or an undisputed right to obtain possession, today. Its denial of access to the notes is therefore a withholding within the meaning of the FOIA.

III.

The district court properly exercised equitable power to order the return of the notes to the Department. Its order properly effectuates the policy of the FOIA that all agency records be disclosed, subject only to specific exemption. The order was necessary and appropriate in aid of its jurisdiction to finally determine if the notes were improperly withheld. The court's order, providing an equitable remedy for petitioner's wrongful removal in a situation where conflict of interest was apparent, was agreeable to the usages and principles of law. 28 U.S.C. § 1651(a).

IV.

The notes are agency records. They record the business of the Department of State and the foreign policy of the United States as conducted by the highest official of

the Department, charged with these duties directly under the President. They are the original and most accurate record of these events, activities and commitments. The intent of Congress was to include such materials within the scope of the FOIA.

V.

Petitioner has no constitutional right of privacy that would be invaded by Departmental inspection of the records. Public officials give up expectations of privacy in their official conduct. This Court has approved the same kind of minimal intrusion for similar public purposes. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

ARGUMENT

I.

THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION AND RESPONDENTS STATED A CLAIM FOR RELIEF UNDER THE FOIA

The FOIA confers jurisdiction "on complaint, . . . to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). The agency's denial of a proper request for records, 5 U.S.C. § 552(a)(3), confers jurisdiction to decide if the denial was a withholding and if it was improper. Decisions whether a denial on the ground that the agency does not have the requested records is a withholding, and whether it is proper or improper, are decisions on the merits. *See, e.g., Forsham v. Califano*, 587 F.2d 1128, 1133 (D.C. Cir. 1978), *cert. granted*, No. 78-1118 (May 14, 1979) (no "right" under the FOIA to inspect raw research data in contractors' hands)

and cases cited at F. Br. 37.[3] Even an agency's plea that despite a thorough search it has found no documents responsive to the request is an issue of the merits of withholding on which proof can be required. *Founding Church of Scientology of Washington, D.C., Inc. v. National Security Agency*, No. 77-1975, slip op. at 21-30 (D.C. Cir. May 15, 1979).

Here the Department of State denied access to the notes on the grounds that they were "the Secretary's personal records," were not "agency records" and "had been transferred to the Library of Congress." A. 73a. By alleging the fact of the State Department's denial of access on these grounds, A. 18a, respondent stated a claim for relief under the FOIA. Respondent's complaint invoked the district court's jurisdiction to decide whether the notes were agency records improperly withheld, and to grant relief under the FOIA if it found they were.

As necessary first steps towards deciding whether the withholding was improper, the district court had to decide whether the notes were "wrongfully removed" from the State Department, and whether they were "agency records" or "personal records." These issues were raised by the State Department itself in its denial of access. App. 73a, 18a. The district court correctly decided those issues against the State Department and

[3]Nichols v. United States, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972), affirmed a judgment on the merits applying the 5 U.S.C. §552(b)(3) exemption (other statute). Ciba-Geigy Corp. v. Mathews, 428 F.Supp. 523 (S.D.N.Y. 1977), granted judgment on the merits, holding that research records created by a contractor were not "agency records," applying a rule of law requiring proof of government ownership, control or use of the documents, *id.* at 529. A lower court decision that petitioner and the federal parties ignore, Tax Reform Research Group v. IRS, 419 F.Supp. 415, 425 (D.D.C. 1976), said, in reaching the merits of the propriety of an agency's denial, "that the agency may no longer be in physical possession of the records . . . is not determinative."

petitioner. Pet. App. 55a, 58a. Having decided these issues it was empowered, indeed required, to take the next step and order the notes returned to the State Department.

> Jurisdiction is defined to be the power to hear and determine the subject matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.

United States ex rel. Riggs v. Board of Supervisors, 73 U.S. (6 Wall.) 166, 187 (1867).

II.

THE DEPARTMENT OF STATE NEVER LOST LAWFUL POSSESSION, CUSTODY AND CONTROL OF THE NOTES AND ITS DENIAL OF ACCESS TO RESPONDENT WAS A WITHHOLDING UNDER THE FOIA

The Federal parties concede that the FOIA "entitles the requesting party to examine . . . agency records in the agency's possession at the time the request is made." F. Br. 37. They concede that the FOIA is violated if an agency "refuses to produce documents in its custody." *Id.* And they would concede that the district court's judgment must be affirmed if the State Department had either "possession [or] an undisputed right to obtain possession of the notes" at the time the FOIA request was made. F. Br. 38 n.26; *see also* F. Br. 18-19; Pet. Br. 28 [asserting that the FOIA "requests were filed *after* Dr. Kissinger had transferred the notes to the Library of Congress." (emphasis in original)].

The State Department indeed had possession and custody as a matter of law and an undisputed right to obtain possession of the notes when respondent's FOIA

request was delivered on December 28, 1976, and does today. The State Department's denial of access to the notes was therefore "a withholding" within the meaning of the FOIA. F. Br. 37. Accordingly, as the Federal parties concede, in this case the district court could "exercise broad equitable powers to remedy the violation, even if this means compelling production of the withheld document from a third party." F. Br. 37-38; *see id.* 18.

A.

Petitioner's Removal of the Notes Was a Violation of His Fiduciary Duty in Circumstances in Which There Was a Conflict of Interest, and Was Wrongful

This petition[4] involves papers recording petitioner's conduct of the Office of Secretary of State from September 22, 1973, when he took office, to January 20, 1977, when he left office. A. 244a. As Secretary petitioner was the head of the Department, its business, its personnel and its management. 22 U.S.C. §§ 2656, 2658, 2664. In particular he had "custody and charge . . . of all the books, records [and] papers" of the Department. 22 U.S.C. § 2657. In short he was a fiduciary, the express trustee of the Department's "records" and "papers."

The fiduciary nature of public office is long established. *United States v. Carter,* 217 U.S. 286, 306 (1910); *United States v. Podell,* 436 F.Supp. 1039, 1042 (S.D.N.Y. 1977), *aff'd,* 572 F.2d 31 (2d Cir. 1978); *cf. Crawford v. United States,* 212 U.S. 183, 191 (1909). Petitioner's removal of papers in his custody from the Department he headed was in violation of his fiduciary duty and therefore was wrongful and void.

[4]No. 78-1088.

As a fiduciary, petitioner had a duty not even to allow "himself to be placed in a position where his personal interest *might* conflict with the interests of" his principal, the Department. *Fulton National Bank v. Tate,* 363 F.2d 562, 571 (5th Cir. 1966) (emphasis in original). No man may serve two masters. *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 549 (1961), *citing* Matt. 6:24. As a fiduciary, a government official shall not "be allowed to enter into engagements in which he . . . *can* have, a personal interest . . . which possibly *may* conflict, with the interests of those he is bound to protect." *United States v. Carter,* 217 U.S. at 306, *quoting Aberdeen R. Co. v. Blaikie Bros.,* 1 Macq. H. L. Cas. 461, 472 (emphasis added). Therefore petitioner's good faith belief that the notes were personal and not the records or papers of the Department in his official custody, Pet. Br. 5-6, is irrelevant. *Id.; County of Cook v. Barrett,* 36 Ill. App. 3d 623, 631-32, 344 N.E.2d 540, 548 (1975).[5]

Where the situation creates a potential conflict of interest it does not matter how scrupulous is the official's intent. *Cf. Board of Governors of Federal Reserve System v. Agnew,* 329 U.S. 441, 449 (1947). The law imposes "an objective standard of conduct." It recog-

[5]The familiar words of Judge (later Justice) Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), are most apt.

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. [Citations omitted.]

nizes that "an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." *United States v. Mississippi Valley Generating Co.*, 364 U.S. at 549. It imposes "a rigid rule of conduct . . . ." *Id.* at 551. The rule reaches the "ambiguous situation." *Cf. id.* at 557.

Here the situation was not even "ambiguous." Petitioner was aware of the Department's interest in the notes. He admits that he considered the notes "work aids." A. 245a. His work, of course, was to be Secretary of State and to manage the Department and the foreign affairs of the United States. 22 U.S.C. §§ 2656, 2658, 2664. From the time of the first FOIA request for any of the notes, in January 1976, petitioner repeatedly sought the informal advice and finally obtained the formal opinion of his subordinate, the Legal Adviser, that the notes were his personal papers, not papers of the Department. A. 247a, 80a-84a. Secretary Kissinger knew that the notes contained matter that had to remain in "the Department's official records" and had a career foreign service officer make extracts from them for the Department's official records. A. 248a.

The record more than suggests that Secretary Kissinger himself knew of the potential conflict of interest. His removal of the papers from the Department served one of two masters, his personal interest, adversely to another, the Department he headed under the President.[6] The removal was a breach of trust, and, as the district court held, wrongful.

[6]Section 208 of Title 18, U.S.C. makes it unlawful for "an officer . . . of the executive branch of the United States Government" to participate "personally or substantially as a Government officer . . . through decision, approval . . . or otherwise, in a . . . matter in which, to his knowledge, he . . . has a financial interest"

[footnote continued]

B.

Petitioner's Wrongful Removal of the Papers Left the Department with Lawful Possession, Custody and Control of the Papers

At the point when petitioner, Secretary of State and custodian of the Department's papers, 22 U.S.C. § 2657, first asserted an interest in the notes adverse to the known, potential interest of the Department (as, for example, when he removed the notes to the Rockefeller home in October 1976), he became a constructive trustee of the notes for the Department.

> A constructive trust
>
> arises not by any agreement or understanding of the parties but by operation of law and is imposed upon grounds of public policy, to prevent a person from holding for his own benefit that which he has gained by reason of a special trust or confidence reposed in him by an innocent party.

County of Cook v. Barrett, 36 Ill. App. 3d at 627, 344 N.E.2d at 545. Constructive trust is "a strict equitable doctrine applied to cure a fiduciary's breach of his duty of loyalty by erasing the source of his conflict of interest, and transferring it to the innocent beneficiary." 36 Ill. App. 3d at 631, 344 N.E.2d at 548. It is imposed on

unless he first advises "the official responsible for [his] appointment" and receives in advance a "written determination" approving his action. The record here does not reflect that either when he first removed the notes to the Rockefeller home in October 1976, A. 247a-248a, or when he had them delivered to the Library of Congress on December 28, 1976, A. 249a, petitioner informed President Ford of the "nature and circumstances." Nor does the record reflect the written approval of President Ford. Petitioner had an obvious "financial interest" in the removal of the notes from the Department and their deposit in the Library of Congress with exclusive access for himself. *See* A. 43a-44a, 46a, 286a, 289a-290a.

whatever a public official may receive or take "through the acquirement of an interest in conflict with his fidelity as an agent." *United States v. Carter*, 217 U.S. at 306. It arises at the moment the adverse interest arises. Bogert, Trusts & Trustees § 471 at 6 (rev. 2d ed. 1978).[7]

Petitioner's subsequent transfer of the notes to the Library of Congress does not affect the Department's rights under the constructive trust. The Department, the innocent beneficiary, "has a full right to follow such property into the hands of such third person." *Oliver v. Piatt*, 44 U.S. (3 How.) 333, 401 (1845); *cf. Sterling v. Blackwelder*, 383 F.2d 282, 284 (4th Cir. 1967). The constructive trust attaches to the notes themselves *in specie*. Restatement of Restitution § 201(1)(1937); Bogert, Trusts & Trustees § 866 at 47-48. This is particularly the case where the property, as here, is unique.

Moreover, petitioner did not in fact relinquish possession of the notes when he transferred them to the Library of Congress.[8] His deed of transfer reserved to himself "both the power and the intention to exercise dominion over" the notes, "either directly or through another

[7]The court must give expression to the idea that the defendant has been under an equitable duty to give the complainant the benefit of the property ever since the defendant began to hold unjustly, by holding that the defendant has since the inception been in the same position as if he had been an express trustee of the property for the complainant. To reach the result desired, the rights and duties of the parties are to be the same as if the defendant had been, from the beginning of his inequitable holding, an express trustee for the complainant. To obtain this end the court constructs a trust and makes the defendant a trustee by decree of the court for the purpose of working out justice. Bogert, § 471 at 6-7.

[8]The Federal parties' brief suggests a question not heretofore considered. What happened to the notes that were not transcribed until after the first shipment to the Rockefeller estate? What

[footnote continued]

person." *United States v. Figueroa*, 337 F.Supp. 645, 650-51 (S.D.N.Y. 1971). He reserved exclusive access to himself and his designees. He reserved the right to exclude all others, even Library employees whom he did not approve, for 25 years or until five years after petitioner's death. A. 43a-44a. Therefore, even though petitioner physically deposited the notes in the Library, the notes remained "under his control," "in a place where [they were] put by his act or in his behalf" and were "within his power in such a sense that he can and does command [their] use." 63 Am. Jur. 2d *Property* § 39 (1972). As Mr. Justice Holmes succinctly put it, "[w]hen there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense." *Union Trust Co. v. Wilson*, 198 U.S. 530, 537 (1905).[9]

happened to those not transcribed until after the second shipment to the Library? *See* F. Br. 23, 52. Moreover, the record is silent on the timing of petitioner's transfer vs. respondent's request. The request was delivered by hand on December 28, 1976, A. 69a, but the record does not reflect the hour of receipt. The notes were shipped from the Rockefeller estate to the Library of Congress on December 28. The record does not reflect the hour of receipt at the Library or whether the trucks were government trucks, were paid for by the State Department, by petitioner, or by Vice-President Rockefeller.

[9]One analogy is the definition of a bankrupt's possession of property that is sufficient to vest a bankruptcy court with summary jurisdiction of the property. Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 432-33 (1924). There is sufficient possession "where the property is in the hands of the bankrupt's agent or bailee." *Id.* (Here the Library was Secretary Kissinger's agent or bailee.) It is found "where the property is held by some other person, who makes no claim to it." *Id.* (Here the Library did not oppose respondents' motions for summary judgment in the district court, did not appeal the judgment and takes an equivocal position here. Aside from the remark that it "desires to keep the notes," it makes no claim for the notes, apparently because of the position of the Archivist of the United States, who does not possess the documents but who does claim them; F. Br. 12, 14-16, 18 and nn. 11, 14.)

Nor could petitioner effectively "donate" the notes to the United States. These were papers that he already held as custodian for an agency of the United States. He could only assert ownership of them by a violation of his fiduciary duty. He may not thereby defeat the public's rights under the FOIA.

These notes were not only held "in trust for all the people . . .," *United States v. California,* 332 U.S. 19, 40 (1947), but were subject to express statutory rights of public access. "[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *Id.* at 40 (footnote omitted). Here Secretary of State Kissinger had no authority at all to dispose of property in violation of his trust. His assertion of ownership and transfer of the notes could not cause the Department to lose its lawful rights of possession, nor the public to lose its rights under the FOIA. *Cf. United States v. California,* 332 U.S. at 40. When the State Department, having an absolute right to the notes, denied access to them, it withheld them under the FOIA and the district court properly exercised equitable power to give effect to respondent's rights under the FOIA.

III.

THE DISTRICT COURT CORRECTLY HELD IT HAD EQUITABLE POWER TO ORDER THE NOTES RETURNED TO THE STATE DEPARTMENT

In holding that it had equity power to order the return of wrongfully removed agency documents, the district court cited both the FOIA and *Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 19 (1974). The *Bannercraft* citation refers to this Court's declaration that the FOIA's express grant of injunction power did not

limit other inherent powers of an equity court, noting the Court's earlier recognition of broad equity power and citing the All-Writs Act, 28 U.S.C. § 1651(a).

Petitioner and the Federal parties miscast the district court's holding into the implication of a novel private remedy to force retrieval of documents—a kind of implied derivative cause of action, *see* Pet. Br. 23, 25; F. Br. 29-35.

A.

The District Court's Order Was Authorized as a Proper Way to Enforce the Statute

The FOIA expressly supports the district court's order. It empowers district courts "to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). The parties subject to such order are not limited to the withholding agency. The same section also empowers the district court "to enjoin the agency from withholding agency records." The two provisions together are a grant of power ample to support the district court's order.

That the statute does not go further to specify that the court may issue orders to third parties who wrongfully detain records does not defeat the court's power to do so. This Court has often affirmed that kind of power.

In *United States v. Mississippi Valley Generating Co.* the issue was whether a contract could be invalidated because one of the individuals involved in its negotiation had a conflict of interest in violation of the predecessor to 18 U.S.C. § 208. The Court, noting that the section, a criminal statute, "does not specifically provide for invalidation of contracts," stated that "the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy

embodied" in the statute. 364 U.S. at 563. It found that the remedy was not novel, *id.* at 564, and that even if the result might seem harsh the remedy was "dictated by the public policy manifested by the statute" and "required in order to extend to the public the full protection which Congress decreed by enacting" the section, *id.* at 565-66. Here too the district court's remedy was not novel and was "essential to effectuating the public policy embodied in" the Freedom of Information Act.

In *United States v. Acme Process Equipment Co.*, 385 U.S. 138 (1966), the Court extended *Mississippi Valley*'s authorization of broad remedial power to another statute which provided certain specific civil remedies. The defendant had argued that the statutory remedies were exclusive. The Court found it "natural for Congress to provide this express remedy" but found no "indication . . . that Congress, in providing a civil remedy for a more tangible evil, intended to preclude other civil sanctions necessary to effectuate the purpose of the Act." 385 U.S. at 145.

In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the statute provided for enforcement of rent control by injunction against violations, "or other order." The district court enjoined the future collection of excess rents, but denied the traditional equitable remedy of restitution of back excess rents.

The Court reversed, holding that restitution was a proper remedy. The district court's equitable jurisdiction derived from the express injunction power. The Court held:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.

328 U.S. at 398. As in *Porter*, here the respondents' FOIA interest is a uniquely public interest.

Moreover, as in the *Porter* statute, the general word "order" appears in the FOIA. This "contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion." *Id.* at 399. The court's duty in framing such remedies is "primarily to effectuate the policy of the [statute] and to protect the public interest while giving necessary respect to the private interests involved." *Id.* at 400. The district court's order here does exactly that. It protects the public interest in disclosure of agency records under the FOIA, while giving petitioner and others the right to participate in the release procedures to prevent release of material affecting their private interests.

Porter was in turn extended in *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960). There the Fair Labor Standards Act prohibited discharge of an employee for filing a complaint of violation, granted jurisdiction to restrain violations but expressly withdrew jurisdiction to order payment of wages unpaid in violation of the Act. The issue was whether the district court could nevertheless order reimbursement of wages lost by an unlawful discharge. 361 U.S. at 290. The Court held that the remedy was proper.

The Court quoted extensively from *Porter*, 361 U.S. at 291, and went on to hold that it was unnecessary for the language of the statute to express (as it did in *Porter* and does here) "affirmative confirmation" of equitable power:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to * * * give effect to the policy of the legislature."

Id. at 291-92 (citation omitted).

The principle that runs through these four cases applies here. The district court had and exercised equitable power to effectuate the policy of and to grant a complete remedy to enforce the FOIA. Nothing in the FOIA limits that power; indeed, the statutory language encompasses it. The district court's order was proper.

B.

The All-Writs Act Grants the Authority the District Court Exercised

The passage in *Bannercraft* which the district court cited invokes the All-Writs Act, 28 U.S.C. § 1651(a). The All-Writs Act grants power to federal courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Here the district court's complete exercise of jurisdiction under the FOIA, *see* I, *supra*, required it to order the documents returned to the Department of State, for the court's eventual determination of the propriety of their release to the respondents.

The Court's most recent application of the All-Writs Act is in *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). There it reversed the Second Circuit's holding that the All-Writs Act did not empower a district court to order the telephone company, a third party stranger to the proceeding, to assist the FBI to install a "pen register," an investigative device held authorized

under Rule 41(b), Fed. R. Crim. P. 434 U.S. at 171. The Court declared:

> This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained: "This statute has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve the rational ends of law.'" . . . Indeed, "[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."

Id. at 172-73 (citations omitted).

The Court found it crucial that the burden on the telephone company was not unreasonable, that the telephone company was a regulated public utility "with a duty to serve the public," and that its assistance was indispensable to the FBI's fulfillment of its lawful function. 434 U.S. at 171-78. Here the assistance of the Library of Congress is crucial, for the Library has physical possession of the records. The Library is a government supported public facility with a duty to serve the public. The records are in one location and need be moved only across the city. The burden of transferring the documents is not unreasonable. In sum, *New York Telephone* establishes the district court's power under the All-Writs Act to order the Library to return the notes to the Department of State.[10]

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[10] In *New York Telephone* the Court cited three older decisions that in varying ways also demonstrate the applicability of the

[footnote continued]

IV.

THE DISTRICT COURT CORRECTLY HELD THAT THE NOTES ARE AGENCY RECORDS WITHIN THE MEANING OF THE FOIA

A.

The Asserted State Department Determination That the Notes Are Not Agency Records Is Subject to De Novo Review

Petitioner argues that what he describes as a State Department "decision that the notes were not its records," Pet. Br. 39, was entitled to deference unless it was "arbitrary, capricious, or an abuse of discretion." *Id.* 41.

First, the "decision" cannot be divorced from petitioner's breach of trust and conflict of interest and as such may be void *ab initio*. *See* pp. 10-12, *supra*. In any event, petitioner's argument ignores the plain words of the FOIA.

Whether records are agency records is an issue for court decision under the FOIA, like any other issue; *see* cases cited at pp. 7-8 and 8 n.3, *supra*. As such the district court is to "determine the matter de novo." 5 U.S.C.

All-Writs Act to this case. In United States v. McHie, 196 F. 586 (N.D. Ill. 1912), the Act was found to support power to impound documents belonging to an innocent third party. Use of the All-Writs Act as basis for interrogation of third parties in an inquiry into bail arrangements of a fugitive was upheld in United States v. Field, 193 F.2d 92 (2d Cir. 1951), *cert. dismissed*, 342 U.S. 908 (1952), *quoting* an earlier opinion by Mr. Justice Reed sitting as Circuit Justice, 193 F.2d at 96. The Act was cited as authorizing an order to a third party to ensure the carrying out of an ICC order, Mississippi Valley Barge Line Co. v. United States, 273 F.Supp. 1, 6 (E.D. Mo. 1967), *aff'd*, 389 U.S. 579 (1968). *See*, for citations, 434 U.S. at 174.

In another case, Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971), the All-Writs Act was held to authorize an order allowing an Indian tribe to enter onto land to which the tribe had a lawful right as cotenant. The court noted that "powers under § 1651(a) should be broadly construed." 453 F.2d at 157.

§ 552(a)(4)(B). This language was written into the act precisely to foreclose petitioner's argument. "That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* S. Doc. No. 93-82, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, 93d Cong., 2d Sess. at 43 (1974) (hereinafter *Source Book*); *accord*, H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *Source Book* at 30.

B.

The Notes Are Agency Records Within the FOIA

Petitioner assumes that the Federal Records Act and Department regulations implementing the Federal Records Act (Pet. Br. 35-39) control what must be disclosed under the FOIA. The Federal parties admit that some materials not "records" under the Federal Records Act may nevertheless be subject to FOIA disclosure, F. Br. 49-52. Neither, however, looks to the intent of Congress as embodied in the FOIA itself for guidance about what are agency records under that statute.

The focus of the statute, as its title makes plain, is "information." Of course the information must be recorded, but nevertheless the principle of the Act is "the people's right to know." *See, e.g.*, H.R. Rep. No. 1497, *Source Book* at 23; 27 ("the right of the individual to be able to find out how his government is operating"); 33; S. Rep. No. 813, *Source Book* at 37-38 ("a people who mean to be their own governors, must arm themselves with the power knowledge gives," *quoting* Sen. Long of Missouri *quoting* James Madison); 38 ("a broad philosophy of 'freedom of information' ").

The purpose of the FOIA is to provide maximum information to the public about the operations of government. In signing the FOIA President Johnson commended it as springing "from one of our most essential principles: a democracy works best when people have *all* the information that the security of the nation permits." *Source Book* at 1 (emphasis added). The Act promotes "maximum feasible access by private persons to the internal details of administration. . . ." *The Freedom of Information Act, Hearings on H.R. 5425 and 4960 Before a Subcommittee of the House Committee on Government Operations,* 93d Cong., 1st Sess. 102 (1973) (prepared statement of Assistant Attorney General, Office of Legal Counsel). The Act "presumed the public availability of *all* government information." 1 *Executive Privilege, Secrecy in Government, Freedom of Information, Hearings on S. 858 (etc.), Before the Subcommittee on Intergovernmental Relations, Senate Committee on Government Operations, et al.,* 93d Cong., 1st Sess. 183 (1973) (statement of Rep. William S. Moorhead) (emphasis in original).

The same purpose informed the 1974 amendments to the FOIA. H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. (1972), *reprinted in* Senate Judiciary Comm., Freedom of Information Act and Amendments of 1974 (Pub. L. 93-502) Source Book, 94th Cong., 1st Sess. (Joint Comm. Print 1975) (hereinafter *Amendments Source Book*) at 12 ("the people must know in detail the activities of government," *quoting* the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967)); 20 ("everything should be public . . . the burden is on the Government to defend its non-disclosure of public business," *quoting* Rep. Moorhead); H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), *Amendments Source Book* at 123; S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974), *Amendments Source Book* at 153-54:

> Recognition of the people's right to learn what their government is doing through access to government information can be traced back to the early days of our Nation. Open government has been recognized as the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the Founding Fathers that the public's right to information is basic to the maintenance of a popular form of government. Since the First Amendment protects not only the right of citizens to speak and publish, but also to receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression. Moreover, to exercise effectively all their First Amendment rights, the people must know what their government is doing.

Id. at 157 ("make information available to the public"). *See also* F. Br. 51 and 51 n.38.

In sum, the simple test of the FOIA is that agency records include any papers dealing in whole, and that portion of papers dealing in part with "public business"; papers reflecting "in detail the activities of government," papers whose disclosure will let the "people . . . know what their government is doing."

Under this test the notes are agency records. They "were made in the course of Kissinger's official duties for the purpose of recording agency business and assisting him and other government employees in discharging their official responsibilities. . . ." F. Br. 22; *see* F. Br. 42-43. Petitioner confirms that the notes record the business of government. He testified that his State Department aides reviewed the notes for such purposes as preparing his "appointments schedule," keeping "abreast of [his] activities" and determining "whether any matters [he] had discussed required follow-up or implementation."

A. 245a. The notes include "discussions of official business" with, *inter alia*, "diplomats, government officials" and "two Presidents." Many of the recorded conversations were "formal business conversations." *Id.*; *see* A. 148a-149a.

The notes recording telephone conversations were for the Secretary of State a "convenient and appropriate mode of discharging the duties of his office. . . ." Therefore it was

> not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the officer; is the property of the state and not of the citizen, and is in no sense a private memorandum.

Coleman v. Commonwealth, 66 Va. (25 Gratt.) 865, 881 (1874). The records are "public records . . . 'because the entries in them are of public interest . . . and because they are made under the sanction of an oath of office, or at least under that of official duty.'" *Id.* at 882, *quoting* 1 Greenleaf's *Evidence* § 484. A written record of a transaction in public office made by a public officer is a public record of the office, not the personal property of the holder of that office. *See, e.g., Public Affairs Associates, Inc. v. Rickover*, 109 U.S. App. D.C. 128, 284 F.2d 262 (1960), *rev'd on other grounds*, 369 U.S. 111 (1962), *on remand*, 268 F.Supp. 444 (D.D.C. 1967); *Robison v. Fishback*, 175 Ind. 132, 93 N.E. 666 (1911). *See also Sandy White v. United States*, 164 U.S. 100, 103 (1896) (public officials who keep written materials in the discharge of their official duties are considered to be keeping public records, not private memoranda, whether or not the statutory law demands that they actually do so).

In short it is the character, content and use of the materials which controls.

> To hold that a document received by an agency and actually used by it in agency decision-making is not an agency record for purposes of the Act . . . would seriously undermine one of the central purposes of the Act: to allow the public to become informed on the bases for agency decisions and actions.

Tax Reform Research Group v. IRS, 419 F.Supp. 415, 425 (D.D.C. 1976). This distills into a sentence the clear intent of Congress. The notes are agency records under the FOIA.

C.

The Remand Suggested by the Federal Parties Is Unnecessary

The Federal parties suggest a sort of compromise judgment. They suggest a remand to determine if the extracts petitioner permitted to be made from his notes sufficiently reflect the governmental business recorded in the notes. F. Br. 23, 46-49. They recognize, however, that this would not resolve the conflict between the State Department and the Archivist of the United States. The Archivist insists on retention of originals, no matter what the extracts reflect. F. Br. 12-13, 23.

Respondent seeks, and the FOIA reaches, only those portions of the notes which record government business, not personal matters. If the extracts are indeed a faithful, precise, complete and *verbatim* record of all of those portions, their disclosure may well satisfy the FOIA, if not the Archivist.

The procedure already ordered by the district court is appropriate to determine this, as well as to require additional disclosure to supplement the extracts to the extent they are not a complete and exact transcription of the government business recorded in the notes. Affirmance

of the district court's decision and its order will let the examination and processing of the notes proceed.

The Federal parties lay great stress on agencies' need to be able to dispose of unneeded records in a regular way. They argue that affirmance of the judgment below would disrupt agencies' records management. F. Br. 19, 33-34, 40 n.28.

The fear ignores the unique aspects of this case. The documents at issue here are the work product of the head of the agency himself. He himself removed them from the agency in violation of his trust. Recognition that their removal was wrongful and ordering their return will not affect the regular "disposal of millions of agency records annually." F. Br. 19. Affirmance of the judgment below will set a precedent only for officials of petitioner's rank, that decisions respecting the disposal of original records of government business may not be made by them for their own benefit.

The answer to the question what should petitioner have done is simple. He could have made photo copies of the notes for his own use, A. 263a, and donated the copies to the Library of Congress. He could, and should, have left the decision respecting disposition of the originals to his successor.

V.

INSPECTION AND PROCESSING OF THE NOTES UNDER THE DISTRICT COURT'S ORDER INVADES NO CONSTITUTIONAL RIGHT OF PETITIONER

Petitioner's argument on this point is disposed of by *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Respondent adopts the argument of the Federal parties beginning with the second full paragraph on F. Br. 56 to the top of *id.* 58.

CONCLUSION

The judgment below in No. 78-1088 should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

and

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Petitioners,

v.

HENRY A. KISSINGER,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER AND CROSS-RESPONDENT HENRY A. KISSINGER

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I. THE REQUESTERS' COMPLAINTS SHOULD HAVE BEEN DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION UNDER THE FREEDOM OF INFORMATION ACT, BECAUSE FOIA APPLIES ONLY TO RECORDS IN THE CUSTODY OR CONTROL OF AN AGENCY.

A. Introduction

At issue in this case are rough, unedited notes of Dr. Kissinger's telephone conversations, made when he was a Presidential Assistant and Secretary of State, which he donated to the United States and lodged in the Library of

Congress shortly before he left office.[1] After the transfer, the private respondents ("requesters") sought these notes under the Freedom of Information Act as State Department "agency records" which they say Dr. Kissinger had no power to relinquish and the Library had no power to receive. They ask that the notes be returned to the agency from which they were "unlawfully removed."

The first question is whether requesters are the proper parties to assert such claims. The situation is anomalous:

> The disputed telephone notes are in the possession of the Library of Congress. They are the property of the United States . . . . The Library of Congress desires to keep the notes; the State Department, so far as this record discloses, does not want them back. Fed. P. Br. 17-18.[2]

What rule of law entitles members of the general public to demand that a court "order the notes transferred from an institution that wants them to an instutition that does not"? *Id.* at 18.

[1] At issue in No. 78-1088 are notes made when Dr. Kissinger was Secretary of State; No. 78-1217 relates to the notes made when Dr. Kissinger was a Presidential Assistant. If this Court reverses in No. 78-1088, it must necessarily affirm the decision below in No. 78-1217. We believe the additional issues raised in No. 78-1217 have been adequately treated in our main brief, and thus limit this Reply to the questions presented in No. 78-1088.

[2] "Fed. P. Br." refers to the Brief for the Federal Parties filed herein. Other references are to the Brief for Respondents and Cross-Petitioners Reporters Committee for Freedom of the Press, *et al.* ("RCFP Br."), the Brief for Respondents Military Audit Project, *et al.* ("MAP Br."), the Brief for Petitioner and Cross-Respondent Henry A. Kissinger ("Kissinger Br."), and the Appendix to the Petition for a Writ of Certiorari filed in No. 78-1088 ("Pet. App.").

Requesters rely on FOIA. But FOIA only permits a district court to enjoin an "agency" from "withholding" "agency records." Requesters say this language must be read to mean that federal agencies have an affirmative responsibiltity to produce all "records" requested by members of the public; that his duty extends to documents, *wherever located,* which conform to the legal description of "agency records"; that FOIA empowers district courts, independently, to decide whether documents *not in the possession of an agency* meet that description; and that, if the court finds such documents are "records", it has jurisdiction under FOIA to order a non-agency custodian to return the "records" to the agency.

Here the State Department itself determined that the notes, which had been treated and filed as personal from the time they were originated, were not records. The official records of Dr. Kissinger's oral commitments and decisions were comprised of other memoranda and papers contemporaneously made and filed when his conversations were followed up and implemented. In addition, the notes were later reviewed and extracts or summaries made as necessary to supplement the already existing records. The Department permitted Dr. Kissinger to transfer the notes to security-approved facilities at the Library of Congress as part of a process worked out by the Department's chief legal and administrative officers to assure that the transfer complied with Department policies and regulations relating to the removal of papers by retiring officials. Those procedures were adopted, approved and implemented, and the notes transferred to the Library, *before* the FOIA requests at issue here were filed with the Department.

Requesters seek judicial review of the Department's determination that the notes were not "records," and an order directing Dr. Kissinger and the Librarian to return the notes to its custody. The District Court granted that relief. Since FOIA does not provide for such relief, the effect of the decision was to grant a private right to enforce the records retrieval provisions of the Federal Records Act (44 U.S.C. § 3106) even though it is clear that no such right can be implied. *See* Kissinger Br. 23-24; Fed. P. Br. 26-34. And the court granted this right to litigants who expressly disclaim reliance on the Federal Records Act as the basis for their claims. RCFP Br. 95; MAP Br. 17. This was error.

B. Neither FOIA Nor Any Other Law Gives Requesters The Right To Sue Dr. Kissinger Or The Librarian of Congress.

Requesters do not contend that FOIA or any other law gives them a right to sue Dr. Kissinger or the Librarian for return of the notes. They argue instead that FOIA provides the basis for ancillary relief against non-agency custodians of "unlawfully removed agency records" when the agency defendant could but does not act to recover the "records." Their theory is that district courts have authority, either by exercise of their inherent powers as courts of equity or by use of the extraordinary powers conferred by the All Writs Act, 28 U.S.C. § 1651(a), to require non-agency parties to perform such acts as may be necessary "to effectuate the policy of and to grant a complete remedy to enforce the FOIA." MAP Br. 20; *see also* RCFP Br. 95-97.

We agree that a federal district court may exercise its inherent equitable powers to enforce the FOIA, *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974), and that it possesses the power

> to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued *in its exercise of jurisdiction otherwise obtained. United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977).

The controlling language is underscored. Procedural remedies, whether equitable or legal in their historical origin, cannot be used to extend the scope of substantive legal rules. *See Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F. 2d 1352 (10th Cir. 1972); *Doyle v. Milton*, 73 F. Supp. 281, 284-85 (S.D.N.Y. 1947).

C. The State Department Did Not Violate FOIA: FOIA Does Not Require Agencies To Institute Retrieval Actions In Order To Comply With Information Requests.

Ancillary relief against Dr. Kissinger and the Librarian could not under any theory be justified in the absence of a finding that the *State Department* violated the FOIA. Although the District Court's opinion contains no such finding, requesters suggest this Court can remedy the deficiency by holding that

> when an agency refuses to regain custody over documents that are its records and remain subject to its legal control, it is "withholding" those records in violation of the Act and the courts have jurisdiction to require an appropriate remedy. RCFP Br. 82-83. *See also* MAP Br. 16.

They further suggest that an agency has "legal control" over records it does not possess if it might secure them by

legal action against the custodian. RCFP Br. 92; MAP Br. 16.

Requesters' case is that an agency "legally controls" what it could seek by suit, and that a failure to sue for records constitutes a "withholding" within the meaning of 5 U.S.C. § 552(a)(4)(B). These are not the usual meanings of "control" and "withheld". In ordinary speech, a person does not "withhold" something which he neither possesses nor controls, nor does he "control" that which he cannot possess without resort to legal process. To "withhold" is to "desist or refrain from granting, giving, or allowing: keep in one's possession or control: keep back." The synonym of "withhold" is "keep". Webster's Third New International Dictionary (1976).[3]

There is nothing in the Act's legislative history to indicate Congress intended "withhold" to imply a duty to institute possessory actions in order to comply with a request for access to agency records. The principal impetus for the Act's passage was Congress' belief that the former "public information" section of the Administrative Procedure Act gave agencies too much discretion to withhold from the public "matters of official record". From the beginning, the focus of the new legislation was to limit the agencies' discretion to withhold information they had but were reluctant to release. *See, e.g.*, S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Questions relating to an agency's duty to create, or retain, or retrieve, records did not enter

[3]It is, in fact, difficult to speak of "withholding" without at the same time referring to "possession". *See N.L.R.B. v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 221 (1978) ("FOIA requires that records and material *in the possession of federal agencies* be made available on demand to any member of the general public.") (emphasis added)

into the discussions because these matters were governed by the entirely separate provisions of the Records Disposal and Federal Records Acts. 44 U.S.C. §§ 2101 *et seq.*; 3301 *et seq.* *See* Fed. P. Br. 35-37.

FOIA creates an exception to the standing requirements and other limitations on review of agency action imposed by the Adminstrative Procedure Act. The notion that Congress intended an exception it created for a specific purpose to serve as a vehicle for unrestrained judicial review of agency recordkeeping decisions defies logic and common sense. FOIA authorizes district courts to enjoin agencies from withholding agency records; it does not authorize courts to order agencies to procure records they do not have or to order non-agency defendants to deliver records to agencies so the agencies can produce them. The District Court should have dismissed requesters' complaints for failure to state a claim upon which relief could be granted.

II. EVEN IF FOIA APPLIES TO DOCUMENTS NOT IN THE CUSTODY OR CONTROL OF AN AGENCY, THE NOTES ARE NOT "AGENCY RECORDS" SUBJECT TO FOIA.

If the Court decides that requesters had no legal right under FOIA to compel the State Department to retrieve the notes, it need proceed no further. Otherwise, it must review the correctness of the lower courts' decisions that, contrary to the Department's own view, the notes are the Department's "agency records".

A. Requesters' Analyses Of The "Agency Records" Issue Are Unsupported By Precedent And Contrary To Law.

The MAP requesters' analysis has the virtue of simplicity. They argue that FOIA requires the production of "information," and that

> the simple test of the FOIA is that agency records include any papers dealing in whole, and that portion of papers dealing in part with "public business"; papers reflecting "in detail the activities of government," papers whose disclosure will let the "people . . . know what their government is doing." MAP Br. 25.

By this test the notes – or at least those "portions of the notes which record government business," *id.* at 27 – would be "agency records". So, too, would be virtually every piece of paper generated by government employees, the great bulk of which is routinely discarded. So, too, would be many of the supposedly private papers donated over the years by former government officials to public and private institutions.[4]

[4]The MAP requesters attempt to limit the extraordinary reach of their argument by suggesting it would apply "only for officials of petitioner's rank," to assure that "decisions respecting the disposal of original records of government business may not be made by them for their own benefit." MAP Br. 28. No authority is cited – and there is none – for the extraordinary proposition that different rules apply to different government employees depending upon their rank. The difficult underlying problem, however, is what records are personal. The General Services Administration reports that

> [t]here is no established government-wide definition of personal records. . . . Personal records are presently considered to be simply those records which are not official . . . . *Compliance with GSA regulations regarding maintenance, protection, and disposition of records by senior officials is ultimately the decision of the senior official himself.* A. 216a (emphasis added).

This is true of other agencies as well. *See, e.g.*, A. 227a ("It has been customary for [Federal Trade] Commissioners and other agency employees to remove papers *they consider personal* from their files at the time they leave the agency.") (emphasis added)

The RCFP requesters' more elaborate presentation reaches essentially the same conclusion. They argue that

> a document must be considered a 'record' . . . unless it has *no conceivable value* as evidence of government activities and operations. RCFP Br. 40 (emphasis added). *See also id.* at 30, 63.

This argument is based on a construction of the Records Disposal and Federal Records Acts and is even more mischevious. It would subject virtually all documents having "value as evidence of agency affairs" (*id.* at 24) to the disposal procedures set forth in the Records Disposal Act. This, of course, is its intention, for the RCFP requesters' basic premises is that

> [n]o agency has discretion to reclassify a document which *does* have such evidentiary value as a 'non-record.' *Id.* at 24 (emphasis in original). *See also id.* at 30, 41 n.35, 44.

The District Court granted summary judgment for requesters on the theory that *as a matter of law* the notes made when Dr. Kissinger was Secretary of State were "unlawfully removed agency records." The RCFP argument is thus an effort to salvage the summary judgment obtained below. They seek to persuade this Court that the State Department lacked discretion to determine whether the notes were records or to permit them to be transferred to the Library. But this position simply has no basis under existing law.[5]

[5]Another example of error in the RCFP brief is the assertion that transfer of the notes to the Library violated the terms of the Separation Statement (Form JF-3) which Dr. Kissinger signed upon leaving

The history of the Records Disposal Act makes clear that this legislation places "responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved" as records. H.R. Rep. No. 559, 78th Cong., 1st Sess. 1 (1943). Agencies must and do exercise this responsibility – which includes discretion to allow employees to retain materials the agencies do not need as "records" – without seeking or being required to seek the prior approval of the Administrator of General Services. *See* Kissinger Br. 23-39; Fed. P. Br. 22, 27-28, 39, 43.[6]

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office. RCFP Br. 68-72. That form requires a departing official to affirm that he has "surrendered to responsible officials all classified or administratively controlled documents and materials" which he had in his possession, and that he is not retaining any such materials – "including any diaries, memorandums of conversations, or other documents of a personal nature." A. 255a. What the RCFP requesters overlook is that the form Dr. Kissinger signed was expressly made "[s]ubject to the Memorandum dated November 1976, entitled 'Donation Procedures.' " *Id.* That memorandum authorized transfer of classified documents to security-approved facilities at the Library. A. 253a. It also stated that the contents of Dr. Kissinger's personal files could be transferred to the Library. A. 252a. Each of the Department officials who signed the memorandum knew the notes were in Dr. Kissinger's personal files. A. 260a. When Dr. Kissinger actually signed the Separatement Statement at the end of his term of office, the notes were already safely lodged in the Library's approved facilities. A. 249a.

[6]Agencies are not, of course, free to discard important documentary evidence of their "organization, functions, policies, decisions, procedures, and essential transactions" (44 U.S.C. § 3101) by the simple expedient of treating such papers as "non-record materials." The scheme of the federal records management laws contemplates close cooperation between the agencies and the Administrator to assure that the sometimes conflicting objectives of the federal records management program are met. *See* 44 U.S. §§ 2904(2), 3102(2); Fed. P. Br. 28 n.17. This scheme also provides a remedy in cases where the Administrator believes an agency is not living up to its recordkeeping

B. The Notes Are Not "Agency Records" Under Any Theory: The State Department Properly Relinquished The Notes To Dr. Kissinger Before The FOIA Requests Were Filed.

The federal parties call for dismissal of the complaints on the ground that FOIA does not support the relief granted below, but suggest that if the "records" issue is reached the evidentiary record must be supplemented before that issue can be decided. Fed. P. Br. 39, 58. We agree that the evidentiary record is insufficient to support *affirmance* of summary judgment against Dr. Kissinger. We believe, however, that it is fully sufficient to support a judgment of dismissal.

The federal parties posit a three-part scheme in which the notes could be "records" or "non-record materials" or "personal papers" depending upon the circumstances. Fed. P. Br. 21-22. The Records Disposal Act applies only to documents the State Department treats as "records," a matter the agency itself has discretion to determine. *Id.* at 27-28.[7] "Non-record materials" are documents which

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responsibilities. He may, if informal methods fail and he regards the issue as important, "submit a written report of the matter to the President and the Congress." 44 U.S.C. § 2111(b).

An underlying issue in this case is whether members of the general public should be permitted to involve the federal court system if they question an agency's recordkeeping management procedures. The discussion in Part II of this Reply assumes that this Court, if it rejects the arguments presented in Part I, would allow such involvement. We submit that the essentially political nature of the remedy contemplated by 44 U.S.C. § 2111(b) makes clear that Congress never anticipated agency recordkeeping practices would be subject to judicial review of any kind – much less to review under FOIA. *See* Kissinger Br. 26-27.

[7]The notes were never official State Department records. Official records of the Department are designated and filed as such in its centralized or authorized decentralized files. Department of State, *Records Management Handbook* ("Handbook") ¶¶ 230, 240 (1968). The notes were not, nor were they required to be, so filed.

under the Department's records management program are not required to be retained as "records." *Id.*at 28, 41. The State Department had discretion to surrender such materials to Dr. Kissinger. *Id.* at 43-44. *See also* Kissinger Br. 38-39.

It is unnecessary to question the statutory basis for this analysis or to explore the many difficult problems to which it would give rise — because any notes that were not Dr. Kissinger's "personal papers" when they were created certainly became his "personal papers" when the Department properly relinquished the notes to him for transfer to the Library. Fed. P. Br. 22, 43-44.[8]

Dr. Kissinger had no duty to create the notes. Fed. P. Br. 31 n. 20, 46-47. His duty under the Department's rules was to see to it that his oral "decisions, commitments and discussions of any significance" were "made a matter of record." 5 FAM § 423.2-1. This he did — not with the notes but with the official correspondence, memoranda and other documents contemporaneously generated as a result of the follow-up and implementation of his oral actions and commitments and filed at that time as the

[8]For example, the federal parties suggest FOIA might apply not only to "records" as defined by the Records Disposal and Federal Record Acts but also to a broader category of government "materials" — *if* the agency has and can readily locate such materials. Fed. P. Br. 49-52. This theory, which appears to be of very recent origin, is not a matter they saw fit to raise in either court below. We do not address it here because the notes *were* relinquished and it is thus unnecessary to decide what they might have been before the relinquishment took place. In any event, we think the federal parties have themselves explained why it would be both legally questionable, and impractical, to apply their theory to materials that are not "records" within the meaning of the agencies' records management programs. *See* Fed. P. Br. 49 n.38.

records of his official transactions. *See* Kissinger Br. 5 n.6; A. 86a ("extensive 'memoranda of conversations' covering talks between Kissinger and foreign and U.S. leaders are part of this official file.").[9]

When the question of the notes' status was first raised in January 1976, the Department's Legal Adviser orally advised Dr. Kissinger the notes were *not* State Department records. A. 259a. Later, when plans for the donation were being developed, that advice was reaffirmed and given to him in writing as a formal legal opinion. The Legal Adviser confirmed that Dr. Kissinger had no duty to create the notes. He observed that the notes contained information of a personal nature, that they had not been circulated

[9]The notes were *not* made for the purpose of complying with 5 FAM § 423.2-1:

> My purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow up on matters discussed orally . . . . [T]he notes served as work aids to ease the administrative burdens of my office . . . . The notes had no other function, and were used for no other purposes. A. 244a-45a.

The documents produced by the follow-up actions, not the notes, were the "records" of Dr. Kissinger's oral actions, decisions and significant discussions. *See* A. 167a. For this reason, he "always regarded the telephone transcripts as work aids which I could retain or discard as I chose." A. 245a. This is consistent with the Department's requirement that "working papers" "should be disposed of as soon as they have served their purpose." Handbook ¶¶ 271, 272. The prescribed method of disposition is by destruction or sale as scrap paper or "some other manner that is consistent with . . . security requirements." *Id.* at ¶ 933. Dr. Kissinger did not, as he might have, destroy the notes after the follow-up actions were taken but instead placed them in personal files in his office and, later, in the Library of Congress — methods "consistent with . . . security requirements."

within any agency,[10] that they had been expressly designated and filed as personal from the time they were originated, and that they were "retained solely at your discretion as work aids to help you recall prior conversations and events." A. 81a, 83a. Since there was case law and other "recent authority [to] support the view that such papers are personal rather than agency records," and since under 5 FAM § 417.1a "a retiring official may retain papers expressly designated or filed as personal from their time of origin or receipt," A. 81a, the Legal Adviser concluded

> it is my opinion that under Department of State regulations and other legal criteria, these particular papers are personal and may be retained by you when you leave office. A. 84a.

The Legal Adviser also specifically addressed the notes' relation to Dr. Kissinger's duty to document his oral transactions. Based on his knowledge of the manner in which the notes had been used and kept, he said it was "highly probable" that any decisions and policy actions reflected in the notes

> would have been incorporated in other papers at the time the decisions were implemented – and those latter papers would certainly have become government records. A. 82.

However, he recommended, "as a precaution" to "assure that government records are complete," that Dr. Kissinger

[10] The federal parties and the RCFP requesters assert that the notes were "circulated." *See* Fed. P. Br. 41 n.29; RCFP Br. 76. The facts are that the notes never left Dr. Kissinger's office; they were not available to Department employees generally; only Dr. Kissinger's Executive Secretary and Senior Special Assistant ever saw them. A. 245a-46a. *See* note 15, *infra*.

review the notes and make extracts of any discussions of significant "government decisions or policy actions" not otherwise reflected in the official files. A. 82a; *see* 259a-60a. This recommendation derived from the Department's view that extracting

> in practice . . . is applied to papers containing a discussion of Department activities or decisions not otherwise reflected in existing Department records. A. 204a.

Although the Legal Adviser's opinion makes clear that Dr. Kissinger could have made the extracts himself,[11] he entrusted the task to the Deputy Undersecretary for Management, Lawrence M. Eagleburger, whom he chose

> because he had worked with me during most of the time I had been in government, was familiar with my activities, and therefore could identify the portions of the notes appropriate for extracting. A. 248a.

Dr. Kissinger asked Mr. Eagleburger to read the notes and "extract everything he believed was necessary in order to comply with the regulations and Mr. Leigh's advice." *Id.* This was done, and the extracts are now in the Department's files. *Id.*

[11] The Department's view is that "papers designated and filed as 'personal' at the time of origin or receipt are presumed to be papers in which the individual has the dominant interest – and thus may retain." A. 204a. Extracting is one of the means used to protect "the right of a government employee to retain papers of a personal nature or those prepared with the expectation of privacy." A. 199a. Given its purpose, extracting is of necessity a function to be performed by the person whose privacy is to be preserved.

The federal parties agree that the Legal Adviser's construction of the Department's recordkeeping rules was basically correct. *See* Fed. P. Br. 31 n.20, 48. They also agree that the District Court was bound to defer to the Legal Adviser's construction unless it was "plainly inconsistent with the wording of the regulations." *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Their concern is that they cannot now determine with certainty whether the extracts were "sufficient to satisfy this construction of the [Department's] records management program." Fed. P. Br. 48.[12]

We think the federal parties have misconstrued the Legal Adviser's opinion. That opinion did not *require* that extracts be made in order to satisfy Dr. Kissinger's duty to document his oral transactions. It recognized that ample documentation already existed, and simply recommended a further review "as a precaution" to "assure that government records are complete." A. 82a. Whether this was done, or how well it was done, was not a condition of the Legal Adviser's conclusion that the notes then were and had always been personal papers.

[12] The federal parties assume the matter of the extracts' adequacy could be resolved simply by comparing the notes with the extracts. Fed. P. Br. 23-24, 48. But the notes are not the only official records of Dr. Kissinger's oral decisions, commitments and significant discussions. They merely supplemented the records already made – "a very large and undifferentiated volume of material." A. 79a. If the question is whether the notes still contain significant information not already reflected in the official records, that question can only be resolved by comparing the notes both with the extracts *and* with the entire corpus of official records relating to Dr. Kissinger's administration. We leave it to the federal parties to explain how a court could manage – and why it should undertake – such a monumental undertaking.

We think it is clear in this case that the Department relinquished the notes before requesters demanded FOIA access to them. And the record before this Court demonstrates that the decision to relinquish the notes was not arbitrary, capricious, an abuse of discretion, or contrary to law. Application of that standard here obviates the need for further proceedings in this case. The District Court could and should have rendered summary judgment in Dr. Kissinger's favor.

III. THE DISTRICT COURT'S INSPECTION ORDER IS UNCONSTITUTIONAL.

Whether the District Court's inspection order is valid under the Constitution need not be determined unless this Court concludes, *first*, that requesters stated a cause of action under FOIA and, *second*, that the courts below correctly held, as a matter of law, that all the notes were "unlawfully removed agency records." If the Court does so conclude, it should nonetheless reverse and remand with instructions to conform the order to constitutional requirements.

The courts below assumed that requesters could invoke the District Court's "broad equitable powers . . . to order the return of wrongfully removed agency documents where a statutory retrieval action appears unlikely." Pet. App. 55a. *See* 44 U.S.C. § 3106. On that assumption, requesters, as the State Department's surrogates, would have no greater rights in any such retrieval action than the Department. Certainly, the Department would not be entitled to seize and read the contents of Dr. Kissinger's personal files to determine whether those files contain documents subject to its retrieval claims. The District

Court's order creates for requesters inspection rights the Department could not have asserted itself. [13]

The inspection order can be justified only if *all* the notes are "records." Yet all the parties agree that some, by any definition, are "personal papers" to which they have no claim. RCFP Br. 120; MAP Br. 27, Fed. P. Br. 43 n.30. Any conclusion that all the notes are subject to inspection requires an assumption that Dr. Kissinger lost his privacy rights by "intermingling" personal papers with agency files. *Cf.* 5 FAM § 417. lb. What happened here is the *opposite* of that kind of "intermingling." Dr. Kissinger kept the notes in *personal* files, not agency files, and treated them as *personal* papers, not agency records. [14] If this was

[13] The irony is that the federal parties believe a considerable portion of the notes would, under any theory, not be "records" subject to a retrieval action the Department might institute. Fed. P. Br.38 n.25. The result of the order below, therefore, is to require the Department to inspect papers it does not believe it has the authority to see. The federal parties say the inspection would be constitutional – *provided* this Court holds the notes must be returned to the Department because

> the Department not only has a right of access to the *portions* of the notes that deal with public business *but also never should have let the notes leave the building*. Fed. P. Br. 57 (emphasis added).

Unless the Court so holds, the federal parties concede the inspection is impermissible. And they explain elsewhere in their brief why no such holding is possible. *Id.* at 39-52.

[14] "Intermingling" also occurred in the sense that the notes reflect personal as well as government matters where such matters were discussed in the same conversations. This was unavoidable, given the circumstances under which the notes were made. A. 245a. To say that this kind of "intermingling" converts the notes into public documents as to which no privacy expectations can attach turns the idea of "intermingling" on its head. If Dr. Kissinger had viewed the notes as public documents, he simply would not have made or kept them. A. 246a. That he did keep the notes – in private files – does not mean they can now be summarily seized and read on the bland assumption that the personal matters they contain have somehow become the public's business.

an error, it certainly did not constitute a voluntary surrender of Dr. Kissinger's privacy rights. [15]

There is no constitutional procedure for allowing an adverse party to inspect papers as to which a claim of privilege is made in order to determine whether the privilege exists. Certainly *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), is not such a precedent. *Nixon* sustained archival screening procedures prescribed by a special statute enacted as an emergency measure, but only because the inspection procedures the

[15] Nor did Dr. Kissinger relinquish his privacy rights by permitting his Executive Secretary and Senior Special Assistant to read the notes for the purpose of making extracts. As this Court has observed in another context,

> it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants;...the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego.... *Gravel v. United States,* 408 U.S. 606, 616-17 (1972).

Dr. Kissinger did not forfeit his legitimate privacy expectations when he entrusted another to act as his "alter ego" in making extracts he could have made himself. A limited waiver of privacy for a limited purpose is "not the same as an agreement to accept rummaging by the world at large." *Forsham v. Califano,* 587 F.2d 1128, 1137 (D.C. Cir. 1978), *cert. granted,* No. 78-1118 (May 14, 1979).

statute mandated were the sole practical means of protecting national interests of overriding importance. *Id.* at 454-65. *See* Kissinger Br. 47-48. Privacy rights may not be absolute, and in an appropriate case may perhaps be subordinated to governmental interests of overriding importance, but the desire of private litigants to read the notes – or such portion of the notes as would be available to them under FOIA – does not qualify as an overriding governmental interest.

The ultimate justification for the inspection order is the disingenous suggestion that "processing of Kissinger's notes is no more offensive than the processing of Nixon's materials." Fed. P. Br. 56. We are disturbed that the Department of Justice appears willing to tolerate invasions of privacy if the methods used are "no more offensive than" one other invasion of privacy this Court, reluctantly, allowed once. The emergency that gave rise to Congress' decision to assert dominion over the former President's papers was the product of a constitutional crisis which shook this nation to its foundations. The result, however necessary, must have been distasteful to every member of the Congress as well as to every member of this Court. To suggest that *Nixon* can be taken as a general model for resolution of privilege claims in civil litigation – and this FOIA case is no more than a garden variety dispute about papers the private respondents would like to read – is a travesty.

IV. CONCLUSION

The Court has been apprised that the Archivist of the United States disagrees with the Legal Adviser's construction of the State Department's records management regulations. Fed. P. Br. 23. That dispute, so far as we are aware, continues.[16] The result here is that the MAP and RCFP requesters serve as advocates for the Archivist's views, Dr. Kissinger supports what he believes are the views of the State Department, and the Department of Justice has been obliged to represent all the federal parties – the Archivist, the State Department *and* the Librarian of Congress – in the posture of a beleagured *amicus curiae.*

There is no occasion for this Court to resolve the interagency difference which lies behind and distorts the issues in this case. If the Archivist is dissatisfied, he has his remedy. See note 6, *supra.* And the State Department has its remedy. 44 U.S.C. § 3106. But the requesters' efforts to make capital out of an intramural dispute by reading into

[16]The underlying nature of the dispute relates to the Archivist's efforts to inspect papers the State Department has determined are not its records. *See* A. 47a-48a; 88a-97a; A. 99a-116a. The Archivist, who has jurisdiction over agency *records disposal* decisions, seeks jurisdiction over agency *records creation* decisions as well. Although the brief it has filed in this case never explicitly so states, it is nonetheless clear that the Justice Department does not accept the Archivist's assertion of authority over the agencies' records creation decisions.

FOIA a remedy given by the Federal Records Act to the State Department and to the Attorney General must fail. This case should be resolved by an order to dismiss the requesters' complaints.

Respectfully submitted,

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Nos. 78-1088 and 78-1217

In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY A. KISSINGER, PETITIONER

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PETITIONERS

v.

HENRY A. KISSINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PARTIES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. The courts below held (Pet. App. 49a, 54a-55a) that the FOIA authorizes a suit to compel agencies to retrieve documents that are in the possession of third parties at the time FOIA requests are made, where the documents are "records" within the meaning of the Federal Records Act, 44 U.S.C. 2901 *et seq.*, and the Records Disposal Act, 44 U.S.C. 3301 *et seq.*[1] Our primary submission to

[1]For convenience, we refer hereafter to documents that are records under these acts as "FRA records."

the Court is that this holding is erroneous because the FOIA comprehends only documents that are in the possession and control of the agency and because the records acts provide no private right to enforce any duty an agency may have to create or to retrieve FRA records.

Neither RCFP nor MAP contends (see RCFP Br. 81-82, 97; MAP Br. 23) that the records acts authorize citizens to compel agencies to retrieve FRA records. Instead, they argue, offering different theories, that the FOIA itself must be construed to require agencies to retrieve "agency records" under the FOIA. RCFP contends (Br. 81-82, 97) that FOIA records are equivalent to FRA records, that the notes are FRA records, and that nothing in the FOIA exempts from disclosure records outside the agency's possession. With a broader sweep, MAP contends (Br. 23-25) that even nonrecord materials outside the agency must be returned under the FOIA, if the materials reflect government activities, in order to facilitate the public's "right to know."

The FOIA, however, only forbids "withholding" of "agency records." The natural meaning of these terms comprehends a failure to produce materials that are in the actual possession and control of the agency.[2] The legislative history seems clear that this was Congress' intent. As we explain in our opening brief at pages 35-37

[2]As we point out at page 38 n. 26 of our opening brief and pages 13-14 n. 14 of our brief in *Forsham* v. *Harris*, No. 78-1118, an agency has possession and control when the record is bailed to a third party with an undisputed right to its return on request. Contrary to MAP's claim (Br. 6, 9-10), the Library of Congress is holding the notes under a disputed claim to possession. Thus, the State Department does not now have possession or control of the notes. (We have served copies of our brief in *Forsham* on all parties in this case.)

and in our brief in *Forsham* v. *Harris*, No. 78-1118, the FOIA was enacted in response to a specific problem—under Section 3(c) of the Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 238, agencies were "wrongfully withholding" materials that unquestionably were in their actual possession. There is not a single suggestion in the voluminous legislative history of the FOIA that Congress intended agencies to *retrieve* FRA records or any other materials not in their possession in order to make them available to the public. This legislative definition of the evil addressed by the FOIA gives precise meaning to the words "withhold" and "agency record": only non-exempt documents in the possession of the agency must be made available. See, *e.g.*, *Johansen* v. *United States*, 343 U.S. 427, 431 (1952).[3]

[3]Contrary to RCFP's suggestion (Br. 86-87), there is no reason to believe that this construction of the FOIA will invite violations of the FRA. Even before the FOIA, Congress concluded that violations of the FRA, including any violations motivated by a desire to prevent disclosures under the public information section of the APA, to prevent disclosures in litigation, to prevent disclosures to superiors, or to prevent disclosures to Congress, were adequately policed by GSA oversight, by the records management responsibilities of each agency (44 U.S.C. 2901-3107), and by Congress. Nothing in the FOIA or its legislative history hints that Congress felt that these measures would be inadequate to protect against any additional incentive created by the FOIA to violate the FRA.

Although we agree with MAP (Br. 17-20) that broad equitable remedies may be invoked once an FOIA violation is proven, we stress that the critical threshold question is whether any FOIA violation has occurred. For this reason, MAP's reliance on the All-Writs Act, 28 U.S.C. 1651(a), is misplaced. As illustrated by *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172, 174 (1977), that statute comes into play only to implement a court determination otherwise lawfully reached. The All-Writs Act thus has no application in FOIA suits prior to the finding of an FOIA violation (except in the rare case, not presented here, where a court, in order to preserve its jurisdiction, orders a third party not to dispose of documents pending a judicial determination whether they were the subject of agency withholding in violation of the FOIA).

2. If the Court holds that the FOIA requires an agency to retrieve FRA records relinquished before an FOIA request is made for them, then the Court must consider a series of related questions concerning how courts will determine whether the requested materials are FRA records.

(a) First, the Court must consider the extent to which an agency has discretion to categorize preliminary worksheets, drafts, working papers, and the like as nonrecord materials. The courts below seemed to conclude that no such discretion exists (Pet. App. 54a-55a). As we pointed out in our opening brief (Br. 27-28, 39-41), however, the statutory definition of "record" adopted in 1943 in the Records Disposal Act (44 U.S.C. 3301) necessarily recognizes that not all documents generated in the scope of agency employment are "appropriate for preservation." The definition of "record" in 44 U.S.C. 3301 was adopted to "place the responsibility in the first instance upon agencies for determining what documentary materials should and what should not be preserved" and to "make it clear that [agencies] are not obliged to consider every scrap of paper on which writing or printing appears as a record." See H.R. Rep. No. 559, 78th Cong., 1st Sess. 1 (1943), and pages 40-41 n.28 of our opening brief.

RCFP argues, however, that agencies have no discretion to define the scope of nonrecord materials and that the scope of such materials is inflexibly, albeit impliedly, fixed by 44 U.S.C. 3301.

(i) RCFP contends (Br. 43 n.37) that the phrase "in the first instance" in the 1943 House report simply meant that agencies would make recommendations to GSA for destruction of old records and that GSA would make the final decision. But the legislative history clearly refers to

the threshold determination of "what *documentary materials* should and what should not be preserved" as a "record," making it clear that agencies need not categorize "every scrap of paper on which writing or printing appears as a record." H. Rep. No. 559, *supra*, at 1. The legislative history does not refer to the subsequent determination of what records—once they have been designated as records—should be preserved.

Moreover, once it is recognized that the threshold decision involves the exercise of discretion, it necessarily follows that it is the discretion of the agency—not that of the GSA or the Archivist—that Congress intended to be exercised in determining what is "appropriate for preservation." In 1943, there was no GSA, and the role of the Archivist was limited, as it had been since 1939 (see Pub. L. No. 295, 53 Stat. 1219), to reviewing agency proposals for the destruction of old records. The 1943 legislation did not assign any responsibilities, even advisory responsibilities, to the Archivist in assisting the agency to draw the line between record and nonrecord materials. 57 Stat. 380. In 1950, the Federal Records Act incorporated this definition of "records." See 44 U.S.C. 2901(1). The FRA also emphasized even more clearly that agencies have a measure of discretion in defining what is and is not a record by requiring agencies to establish records management programs that balance, in the context of the record keeping needs of the particular agency, the competing statutory goals of (a) "accurate and complete documentation" of "policies and transactions" of the government and (b) avoidance of the "creation of unnecessary records" and "unnecessary Federal paperwork." 44 U.S.C. 2902(1), (2), (3), (6) and 3101-3102.

(ii) Contrary to RCFP's submission (Br. 50-55), nothing in the Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523, 44 U.S.C. 2201-2207, redefines the scope of a "record" under 44 U.S.C. 3301. First, the statutory definition of a Presidential record differs from the definition of "records" in Section 3301. Second, the House report on the 1978 Act (the only committee report) specifically noted that "[t]o the extent that certain categories of documentary materials are not considered to be records under [44 U.S.C. 3301], the same categories of materials generated or received by the President and his aides would generally also fall outside the ambit of what constitutes a record." H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. 8, 10 (1978). Thus, rather than eliminate the practice of agencies' defining the scope of nonrecord materials, the 1978 Act follows "the practice that has evolved in the administration of [the Federal Records Act]." *Ibid.*

(iii) Nor do the Administrator's responsibilities under the FRA eliminate agencies' discretion in determining what documentary materials should be regarded as nonrecord materials, as RCFP suggests (Br. 55-57). To be sure, under 44 U.S.C. 3102(2),(3) agencies must comply with 44 U.S.C. "2101-2113, 2501-2507, 2701, 2901-1909, and 3101-3107" and any GSA "regulations" issued thereunder and must "cooperate" with GSA in applying "standards, procedures and techniques designed to improve the management of records * * *." But none of the cited statutory provisions authorize GSA "regulations" governing the scope of nonrecord materials or the scope of records management programs.[4] For such matters, the

[4]Examples of GSA "regulations" authorized by the sections cited in 44 U.S.C. 3102(3) are regulations governing inter-agency transfers of records (44 U.S.C. 2908) and regulations governing safeguards against the removal or loss of records (44 U.S.C. 3105).

Administrator may only issue "standards, procedures, and guidelines." 44 U.S.C. 2904. Although agencies must "cooperate" in applying "standards, procedures, and guidelines," such provisions are not binding "regulations."[5]

(b) If the Court holds that agencies have "in the first instance" a measure of discretion in defining what government documents are not "appropriate for preservation" and are thus nonrecord materials, then it would be necessary to consider whether the agency's record management regulations classify the disputed materials as records. In many instances, an agency's regulations will specifically cover the issue, and the answer to this question will be clear. Here, however, the answer is not so clear. State Department regulations required Kissinger to prepare records "in the form of aide-memoire, memorandums of conversation, or memorandums to the file" of "[d]ecisions, commitments, and discussions of any significance which [were] oral in nature * * *." 5 FAM 423.2-1. As we explain at page 46 of our opening brief, Kissinger could have used the notes to prepare such memoranda and, assuming the memoranda were sufficiently complete, then throw away the notes (as nonrecord material). The difficulty presented by this case is that the record does not disclose (i) the extent to which such memoranda were, in fact, prepared and filed or (ii) the sufficiency of the official memoranda prepared by Kissinger, Eagleburger or others involved in the same conversations. These questions can only be answered by

[5]RCFP contends (Br. 56) that the FRA's legislative history shows that agencies are "required" to follow GSA standards and guidelines. The only support RCFP can muster for this proposition is an oblique reference in a letter from the Acting Comptroller General to Senator McClellan commenting on the pending FRA legislation, a comment that no legislator approved. See 96 Cong. Rec. 11096-11097 (1950).

examining the notes, and all other memoranda in the State Department files (prepared by Kissinger, Eagleburger or others), that record the conversations covered by the notes. However, none of these items is before the Court, and none has been examined by the courts below. A remand to the district court would be necessary for such an inquiry.

Assuming that such an inquiry revealed gaps in the State Department's records, then the further questions would be presented whether the telephone notes, despite their arguably informal nature, are records under 5 FAM 423.2-1. Resolving this ambiguity would require a further inquiry into the Department's practices in analogous circumstances and the existence of any authoritative interpretations of the agency's regulations.[6] If this inquiry revealed that any notes covering any gaps must be regarded as records, then any nonexempt notes should be produced under the FOIA. If this inquiry revealed that the notes must be regarded as nonrecord materials under the regulations, then the notes would not be FRA records and would not be subject to FOIA "retrieval."[7]

RCFP presents three arguments in an attempt to avoid a remand on these issues. First, RCFP contends (Br. 63-67) that under the State Department regulations the notes

[6]Insofar as the Legal Adviser construed ambiguities in State Department regulations (rather than addressed issues of general governmental property law) his construction would be entitled to deference. We do not believe that the Legal Adviser's memorandum is dispositive, however, because it assumed in part that adequate extracts would be made from the notes. To the extent this is not the case, the interpretation is not on point.

[7]Even if nonrecord materials in the possession of an agency must be made available under the FOIA, we assume that the courts below (given their reliance on the seemingly mandatory duty to retrieve FRA records) would not require retrieval of nonrecord materials in the hands of third parties. See our opening brief at 49-51 n.38.

are records because they do not meet the definition of personal papers (5 FAM 432). Even so, that does not foreclose the possibility that the notes are nonrecord materials rather than FRA records.[8]

Second, RCFP contends (Br. 75-77) that the State Department's definition of nonrecord materials does not comprehend the notes and that the notes must therefore be records. RCFP would limit the phrases "rough drafts" and "working papers" to uncirculated "personal work product" that reflect no substantive "business communications." See RCFP Br. 30, 37, 43, 46 n.44, 49, 60, 75-77. This crabbed reading is not a practical construction of the relevant language. Every day, government employees make "substantive" notes of oral conversations, use the notes to prepare record memoranda, and then discard the notes. Every day, government secretaries prepare telephone messages for government employees and "circulate" notes for the employees called. Government files would burst at the seams if such notes had to be retained. A more reasonable construction is that the notes are not record materials, at least so long as the memoranda required by 5 FAM 423.2-1 are prepared.

[8]It is true that the "extracting requirement" applies only to personal correspondence, as RCFP states (Br. 65, 73). However, we use the term "extracts" to mean memoranda that satisfy the "memoranda" requirement of 5 FAM 423.2-1. We do not contend that employees may prepare extracts of existing records and then dispose of the records. We do contend that an agency has discretion to require employees to prepare final memoranda (or extracts) from working notes and thereafter to treat the notes as nonrecord materials.

Third, RCFP essentially contends (Br. 68-72) that those portions of the notes containing classified information are FRA records under State Department regulations.[9] This contention rests chiefly on the fact that retiring employees must surrender to the agency all documents containing classified information (A. 255). Even so, it does not follow that such materials are FRA records. Extra copies, which everyone would apparently agree are nonrecord materials (see RCFP Br. 69 n.62), are not elevated to record status merely because they contain classified information. Similarly, if the telephone notes are otherwise nonrecord materials, they are not elevated to record status merely because they contain classified information. The status of a document as record or nonrecord under the FRA is independent of the safeguards that attach to the protection of classified information (in whatever form it appears).[10]

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[9]Our opening brief incorrectly stated (at page 7) that State Department employees removed any classified information from the materials donated under the first deed. In fact, such materials were not removed by the State Department. Instead, the State Department protected the information by ensuring that the Library of Congress would provide appropriate security and access restrictions on the materials (see A. 43-46, 253). This error, however, does not affect our analysis.

[10]RCFP also contends (Br. 69-70) that under Exec. Order No. 11652, 3 C.F.R. 658 (1971-1975 compilation), any portions of the notes containing classified information could only have been disposed of by the State Department in accordance with the Disposal Act. The Executive Order makes clear, however, that classified information, including "working files," may be disposed of in accordance with not only the Disposal Act but also "other applicable statutes" (3 C.F.R. 686 (1971-1975 compilation)). This includes the authority under both the Disposal Act and the FRA to dispose of nonrecord material by donation rather than destruction. In fact, RCFP acknowledges (Br. 69 n.62) that extra copies of records (which are nonrecord materials) containing classified information may be and often are donated to institutions whose security procedures are adequate to protect the

(c) The last question that would arise if the Court were to hold that a refusal to retrieve FRA records constitutes a "withholding" of "agency records" under the FOIA is the appropriate standard of judicial review of agency decisions under the FRA. If we are correct that agencies enjoy a measure of discretion in drawing the line between record and nonrecord materials, then, at most, the appropriate standard would be abuse of discretion. See 5 U.S.C. 702-706. A State Department regulation that does not require the retention of notes once memoranda satisfying 5 FAM 423.2-1 have been prepared would hardly seem to constitute an abuse of discretion. Rather, the regulation would appear to be a reasonable accommodation of the competing goals of the FRA to eliminate unnecessary files and to document adequately the business of the agency. Whether a regulation that classified contemporaneous notes of significant telephone discussions as nonrecord materials in the absence of other record memoranda would amount to an abuse of discretion is a premature question in the present posture of this case. Such a question should be considered only if it were to be established on remand that there are in fact such undocumented discussions and that the State Department's regulations nonetheless regard the notes of those discussions as nonrecords materials.

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information from unauthorized disclosures. See NSC Directive, 3 C.F.R. 1085 (1971-1975 compilation). In the present case, the Library of Congress agreed to provide security procedures acceptable to the State Department (A. 42-46, 253). If the State Department determines that classified information in the notes or materials is not sufficiently protected, it will make further appropriate arrangements with the Library of Congress.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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